89-376

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HERBERT L. FENSTER
Counsel of Record

RAYMOND B. BIAGINI
CHARLOTTE D. YOUNG

MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

Attorneys for Petitioner
General Dynamics Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that the "approval" element of the government contractor defense requires proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act.

2. Whether the Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that General Dynamics failed to prove the "approval" element of the government contractor defense despite undisputed facts that the government was fully aware of the alleged defects in the product yet chose to use it as designed for thirteen years.

3. Whether the holding by the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) that government approval under the government contractor defense can occur only during the design stage, conflicts with the Fourth Circuit's post-*Boyle* decision in *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) and the several fededal circuit court decisions prior to *Boyle* that approval can occur after the design stage where the government subsequently discovers the defects yet chooses to use the product as designed.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are:

(1) Gloria Trevino Parker, plaintiff, formerly Gloria Trevino,

(2) Donald and Emily Bloomer,

(3) Maureen Denisha Bond,

(4) Robert and Rose Fitz,

(5) Esther B. Shelton,

(6) the United States of America, and

(7) General Dynamics Corporation.

Pursuant to Sup. Ct. R. 28.1, General Dynamics Corporation has the following parents, subsidiaries (except wholly-owned subsidiaries), and affiliates:

Etudes Techniques et Constructions Aerospatiales, Societe Anonyme

General Dynamics Limited, Mansour-General Dynamics Limited

Ankara Hilton

Perdata Corporation

Tusas Aerospace Industries, Inc.

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No. ———

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GLORIA TREVINO, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

General Dynamics Corporation petitions for a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Fifth Circuit affirming the finding by the United States District Court for the Eastern District of Texas that General Dynamics failed to satisfy the "approval" element of the government contractor defense.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the lower court appears at 865 F.2d 1474 (5th Cir. 1989), and is reproduced in the Appendix to this Petition at 1a. The denial by the Fifth Circuit of General Dynamics' Petition for Rehearing *En Banc* and the accompanying dissenting opinion by four Fifth Circuit judges appears at 876 F.2d 1154 (5th Cir. 1989) and also is reproduced in the Appendix at 32a. The opinion of the Eastern District of Texas is published

at 626 F. Supp. 1330 (E.D. 1986) and also is reproduced in the Appendix at 40a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was filed on February 24, 1989. The Fifth Circuit's denial of General Dynamics' Petition for Rehearing *En Banc* was filed June 25, 1989. The judgment was entered on July 6, 1989. General Dynamics seeks a writ of *certiorari* pursuant to the provisions of 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

This case arises out of an accident which occurred on January 16, 1982, in which five Navy divers died within the diving chamber of the U.S.S. GRAYBACK, a Navy submarine. The U.S.S. GRAYBACK had been on maneuvers off the coast of the Philippine Islands when the accident occurred. The five divers had just returned to the submarine after conducting demolition exercises at sea. While the divers were inside the flooded diving chamber of the GRAYBACK, one of the divers, Mr. Bloomer, was supposed to open the ventilation valve to allow air in as he drained the chamber of its water. Mr. Bloomer failed to completely open the ventilation valve. As the water drained from the chamber, a vacuum formed, causing the divers to lose consciousness and drown.

In the early 1960s, the Navy had decided to convert the U.S.S. GRAYBACK from a missile-carrying submarine to one which was capable of allowing divers to exit the submarine to conduct exercises in the open sea and then to re-enter the submarine through a flooded diving chamber. In its 339-page Circular of Requirements, the Navy established the basic design concept for the diving chamber. The Navy then chose one of its own shipyards, Mare Island Naval Shipyard located off the coast of Cali-

fornia, to develop the detailed design for the chamber and actually to build, test and install it into the U.S.S. GRAYBACK.

Because of the Viet Nam war, the Navy experienced manpower shortages in the 1960s. Specifically, Mare Island Naval Shipyard contracted with General Dynamics to borrow hourly draftsmen who were then relocated from Groton, Connecticut, to work literally alongside the Navy design personnel in a large "bull-pen" in the Navy's own facility at Mare Island. Between 1966 and 1968, these personnel supplemented the existing Navy staff and assisted them in generating some of the detailed working drawings for the design of the diving chamber. Each working drawing generated by General Dynamics personnel had on its face a review and approval block which ultimately set forth the signatures of several Navy personnel, including the Navy Assistant Design Superintendent of Mare Island who "approved" the drawing. Appendix at 63a.

After 1968, all General Dynamics personnel left Mare Island and the Navy *alone* continued on its own to generate working drawings for the diving chamber design. In about 1969, the Navy *alone* built the chamber pursuant to the design and installed it into the U.S.S. GRAYBACK. The Navy then conducted sea trials with the newly converted submarine. During these trials, that is, before use, and then thereafter through its own overhaul, maintenance and use of the chamber between 1969 and 1982, the Navy became aware of and was repeatedly alerted to the very characteristics of the chamber at issue, i.e., that the ventilation valve was difficult to open and that it was difficult for a diver to discern whether it was fully open. Nevertheless, the Navy chose not to alter the design but, rather, trained its divers to deal with these various features. Between 1969 and 1982, the Navy used the U.S.S. GRAYBACK diving chamber 555 times without mishap.

The families of the divers first sued the United States under the Federal Tort Claims Act, but the suit was dismissed pursuant to *Feres v. United States*, 340 U.S. 135 (1950). In 1982, the families of the divers sued General Dynamics Corporation in tort for damages and General Dynamics filed a contractual indemnity cross-claim against the United States. In *Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330 (E.D. Tex. 1986), Appendix at 40a, the United States District Court for the Eastern District of Texas concluded *inter alia* that General Dynamics had not proven the government contractor defense because it had not shown that the government had approved reasonably precise specifications for the diving chamber.[1]

The district court assessed that General Dynamics was 80% negligent in the design of the chamber and the Navy was 20% negligent in failing to maintain the chamber and adequately train its divers in its use. The district court noted that because the Navy was immune from tort liability, its finding of Navy negligence was of no consequence. The district court ultimately assessed damages against General Dynamics in the amount of $4.25 million and found that the United States was not liable to General Dynamics on the contractual indemnity claim.

General Dynamics appealed the decision on numerous grounds. Following the Supreme Court's opinion in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), which established the government contractor defense as a matter of federal common law, the United States Court

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[1] This conclusion was directly at odds with the explicit admission of the United States Navy made to the court in its post-trial brief that "the Navy approved the working drawings" (Post-Trial Brief of Defendant/Cross-Defendant United States at 15) (dated Nov. 25, 1985), and that "whatever General Dynamics' degree of participation in the design decisions . . . the basic design for such a chamber was the Navy's." *Id.* at 9.

of Appeals for the Fifth Circuit rendered its opinion in *Trevino* on February 23, 1989. The Fifth Circuit affirmed the lower court's decision, concluding that General Dynamics had not proven the "approval" element of the defense.[2] The Fifth Circuit vacated the lower court's findings regarding the United States' indemnity obligations. On June 26, 1989, the Fifth Circuit denied General Dynamics' Petition for Rehearing *En Banc*, with a vigorous dissent filed by Circuit Judge Jolly and joined by three other judges. 876 F.2d 1154 (5th Cir. 1989); Appendix at 32a.

The Fifth Circuit panel reached the following conclusions which are material to the consideration of the questions presented in this Petition:

> (1) "The U.S.S. GRAYBACK was designed and constructed in the late 1950s as a missile-carrying submarine. . . . In the late 1960s the GRAYBACK was converted to a personnel-carrying submarine capable of dispatching divers underwater." *Trevino v. General Dynamics Corp.*, 865 F.2d at 1476; Appendix at 3a.
>
> (2) "The Navy established the basic design concept for the modifications to the GRAYBACK in a 339-page circular of requirements (COR) describing the design concept . . . [and] selected Mare Island Naval Shipyard (MINS) as the site for the design and conversion work." 865 F.2d at 1476; Appendix at 3a.
>
> (3) "In 1966 and 1967 the Navy contracted with General Dynamics Corporation Electric Boat Division to do the design work on the diving hangar. The contracts required General Dynamics to produce

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[2] This conclusion by the Fifth Circuit was directly contrary to the explicit admission made on the record to the court by the United States Navy that "there is no serious question in this case that the Navy indeed approved the final plans . . ." and that "General Dynamics has met this element of the *Boyle* test." Letter Brief of the United States at 8 (dated Aug. 15, 1988).

working drawings of the hangar . . . ." 865 F.2d at 1476; Appendix at 3a.

(4) "After General Dynamics completed the drawings, the Navy "did undertake to review the working drawings for compliance with the COR." 865 F.2d at 1487 n.14; Appendix at 26a n.14.

(5) "[T]he Navy performed all the manufacturing and conversion work [for the diving chamber] on the GRAYBACK." 865 F.2d at 1477; Appendix at 3a.

(6) "The defective aspects of the design and the dangers of the vacuum were so obvious that the Navy must be charged with knowledge of the defect; yet the Navy built the diving hangar as designed and operated it for thirteen years." 865 F.2d at 1487 n.13; Appendix at 25a n.13.

(7) "The Navy operated the submarine for 13 years without mishap, although Navy personnel noted on at least four occasions that the ventilation valve control was difficult to turn." 865 F.2d at 1477; Appendix at 4a.

(8) "The Navy had control over the product and had every opportunity to exercise discretion over the design. This the Navy did not do." 865 F.2d at 1487 n.13; Appendix at 25a n.13.

(9) The Navy "knew that the system as designed could create a partial vacuum." The Navy "could see that the final design included no safety devices." 865 F.2d at 1487; Appendix at 27a.

(10) "The Navy chose to use the GRAYBACK as designed and dealt with the possibility of a vacuum by training its employees rather than modifying the submarine. Furthermore, the Navy exacerbated the dangers by failing to lubricate the shaft of the valve properly, making it more difficult to turn and more likely that a diver would not realize that it was partially closed." 865 F.2d at 1488-89; Appendix at 29a.

(11) "[T]he Navy's method of dealing with the dangers in the design were effective for thirteen years." 865 F.2d at 1489; Appendix at 29a.

REASONS FOR ALLOWANCE OF THE WRIT

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), this Court defined the three elements of the government contractor defense:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

108 S. Ct. at 2518. Because the Fifth Circuit in *Trevino* found that General Dynamics met the second and third elements of the defense, 865 F.2d at 1487; Appendix at 26-27a, the sole issue addressed in this Petition is the first, or "approval," element of the defense.

The Fifth Circuit's opinion in *Trevino*, issued not even one year after *Boyle*, essentially dismantles and emasculates the government contractor defense by adopting an unworkable interpretation of *Boyle*'s approval test.[3] In *Boyle*, this Court stated that the approval element is satisfied so long as it is demonstrated that the design feature in question was "considered" not only by the contractor but also by a government official. 108 S. Ct. at 2518. Commenting that "[t]he Supreme Court's use of the terms 'approved' and 'considered' is unfortunate," 865 F.2d at 1481 n.7; Appendix at 13a, the Fifth Circuit proceeded to redefine those terms so as to render this Court's choice of words meaningless.

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[3] Notably, in an opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing, Circuit Judge Jolly stated that "*Trevino* has effectively rewritten the Supreme Court's test for government contractor immunity given in *Boyle*." 876 F.2d at 1155; Appendix at 34a.

The *Trevino* court's microscopic focus on the word "approval," unwarranted by *Boyle*, begins with the statement that mere government "rubber stamping" of contractor specifications will not suffice, a standard which General Dynamics does not dispute. 865 F.2d at 1485-86; Appendix at 23a-24a. The court proceeded, however, to the other end of the spectrum, holding that if the contractor participates in the design of military equipment, the government's approval" of that design must embody the exercise of a discretionary function under the Federal Tort Claims Act. To show "approval" or "consideration" under *Trevino*, a government contractor must show that the government official performed a "substantive review and evaluation" rising to the level of a policy decision. 865 F.2d at 1486; Appendix at 23a.

By unconditionally importing into the government contractor defense the body of law interpreting the discretionary function exception, *Trevino* introduced into the elements of the defense an entire area of legal analysis clearly not intended by this Court.[4] Under *Trevino*, the government must insert itself into the design process to such an extent that it may as well have generated the design itself.

Moreover, the Fifth Circuit's impossible test for approval reaches far beyond the *Boyle* requirement, placing artificial limits on *when* and *how* government approval can take place. In this respect the *Trevino* decision conflicts directly with the established law in the federal circuits, prior to (and unchanged by) *Boyle*, that "approval" can occur during *or* after the design phase. In contrast, the Fifth Circuit held that approval can only occur during the design phase of the product and then

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[4] Notably, there is currently extraordinary tension among the federal circuits regarding the parameters of the discretionary function exception. *Compare Dube v. Pittsburg-Corning Corp.*, 870 F.2d 790 (1st Cir. 1989) *with Kennewick Irrigation District v. United States*, No. 87-4203 *et al.* (9th Cir. July 12, 1989).

only through an expert evaluation of written design specifications. Under *Trevino*, government approval cannot occur after such time even where, as here—and as the court found—the military itself: (a) actually *builds* the product at issue; (b) *uses* it for 13 years as designed; (c) *knows* of the alleged defect for the entire period of use; and (d) *elects* not to alter the design. *Trevino*'s unwarranted fixation on the design phase completely eclipses this Court's choice of the word "approval."

This approval test also is in direct conflict with a post-*Boyle* decision from the United States Court of Appeals for the Fourth Circuit, which has established that prolonged use of a military product by the government with knowledge of the defect constitutes approval and acceptance of that design. As Circuit Judge Jolly stated similarly in his opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing:

> [Although the *Boyle* Court chose the word "approve",] the panel in *Trevino* finds that the term "approve" as used in *Boyle* actually means to *establish* reasonably precise specifications, *id.* at 1479; it actually means to "choose" a design feature, *id.* at 1480; it actually means to exercise judgment or policy choice, *id.* at 1484; it actually means to substantively review and evaluate, *id.* at 1487 n.12; in short, it actually means to exercise a discretionary function within the strict meaning of the FTCA. We learn further in *Trevino* that one cannot "approve" a design by full awareness and acceptance of that design, defect and all, for thirteen years, *id.*; and finally, we learn that "approve" is a term that cannot be applied to work done by someone else, *id.* at 1486 ("If the government delegates its design discretion to the contractor and allows the contractor to develop the design, the government contractor defense does not apply . . . .").

876 F.2d at 1155; Appendix at 35a (emphasis in original).

Notably, the Fifth Circuit's *Trevino* opinion directly conflicts with another opinion issued in the *same circuit* on the *same day*. In *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), the Fifth Circuit affirmed the district court's decision entering judgment for the military contractor on the basis of the government contractor defense. In particular, the *Smith* panel adopted pre-*Boyle* case law that approval could occur not only through a review of specifications but also through a review of the product itself. *Id.* at 137-38 (discussing favorably the Fourth Circuit's recognition that approval can occur where the military reviews and approves a mock-up of the equipment). The *Smith* court also found that the lower court properly allowed the defense "in light of the government's acceptance and *extended use*" of the product. *Id.* at 139 (emphasis added). Thus, the *Smith* panel implicitly rejected the narrow *Trevino* approval test by acknowledging that approval can take place in ways other than a substantive, policy-level review of reasonably precise specifications. Even Circuit Judge Jolly, the author of *Smith*, acknowledged that his analysis in *Smith* would "surely have been different" had the *Trevino* approval test been the applicable law at the time. 876 F.2d at 1156; Appendix at 38a.

Not only does *Boyle*'s rationale embrace a broader "approval" test which would cover these subsequent events, but the practical and direct result of *Trevino*'s unduly limited interpretation is to eliminate the protection from tort liability afforded to military contractors and to deter contractors from participating in design efforts. The *Trevino* court's wholesale importation of the discretionary function test into the government contractor defense inexorably will force the courts to second-guess governmental judgments regarding the design of military weaponry, for no contractor could prove that a "substantive" evaluation by the military took place without probing the depth and merit of that evaluation. Because the approval test of the government contractor defense will

be rendered impossible for military contractors to prove under *Trevino*, the *Boyle* decision itself will be rendered a nullity.

Therefore, if the Fifth Circuit's narrow definition of approval is allowed to go unreviewed by this Court, government contractors will not only be subjected to inconsistent legal definitions of approval, but also, at least in the Fifth Circuit, will be essentially denied the protection of the government contractor defense. Moreover, plaintiffs will easily plead around the *Trevino* test and—win or lose—will force the courts at trial to examine in depth military decision-making relating to equipping the armed forces. This Court should grant this Petition to minimize any further multifarious pronouncements from the lower courts and to ensure that their approach to the government contractor defense does not proceed down various inconsistent and illogical paths so soon after *Boyle*.

I. THE FIFTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *BOYLE v. UNITED TECHNOLOGIES CORPORATION* IN ITS APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE GOVERNMENT CONTRACTOR DEFENSE

The *Boyle* Court began its consideration of the government contractor defense with the issue of whether such a defense could exist "in the absence of legislation specifically immunizing Government contractors from liability for design defects." 108 S. Ct. at 2513. Ultimately, this Court concluded that liability for design defects cannot be imposed, as a matter of federal common law, where the three elements of the defense were met. *Id.* at 2518. This Court found the requisite "significant conflict" to justify displacement of state law in the policies underlying the discretionary function exception to the Federal

Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a) (1982). *Id.* at 2517.[5]

In *Boyle*, the discretionary function exception provided a "statutory provision that demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of government procurement." 108 S. Ct. at 2517. The first two elements of the defense, approval and conformance, "assure that the suit is within the area where the policy of the 'discretionary function' exception would be frustrated." *Id.* at 2518. This Court's reliance on the discretionary function exception left unresolved to what extent, if any, the body of law addressing that exception should be imported into the government contractor defense. It does not appear, however, that the *Boyle* decision intended to engraft the entire body of FTCA discretionary function exception law on to the government contractor defense.[6]

A. The *Boyle* Opinion Could Not Have Intended To Require Proof Of A Policy Level Discretionary Function To Satisfy The Approval Element Of The Government Contractor Defense

At the Fifth Circuit, General Dynamics argued that this Court's reliance on the discretionary function exception was intended only to signal the necessary threshold conflict with state law to justify and trigger application of federal common law. The Fifth Circuit disagreed, finding instead that this Court intended essentially to

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[5] Under that exception, the government is exempt from consent to suit for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

[6] The law regarding the discretionary function exception is itself pertubated and in a high state of conflict among the circuits. *See* n.4, *supra*.

replace "approval" with "exercise of discretion." [7] Thus, rather than using the exception as a precondition which "suggests the outlines" of the defense, 108 S. Ct. at 2517, the *Trevino* court held that when the contractor participates in the design of military equipment, the government's approval of that design "*must constitute a discretionary function.*" 865 F.2d at 1480; Appendix at 10a (emphasis added). The Fifth Circuit held: "If the government contractor exercised the actual discretion over the defective feature of the design, then the contractor will not escape liability via the government contractor defense" unless "the government's cognizance of the relevant design features . . . [is] on par with that of the government contractor." 865 F.2d at 1480, 1481 n.7; Appendix at 11a, 13a n.7. The government's approval must "involve the use of policy judgment." 865 F.2d at 1472; Appendix at 10a.

The *Trevino* requirement that governmental "approval" cannot exist without a policy level cognizance by the government of relevant design features "on par with that of the government contractor" will not only overly burden an already arduous design process for military equipment, but will stifle the contractor's creative participation in that process. As such, the defense is stripped of one of its primary objectives: to encourage and protect contractors' participation in the design of military equipment. 108 S. Ct. at 2518. If the contractor can only show approval by showing that the government, not the contractor, made all the design choices, the contractor's participation in the design process becomes meaningless.

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[7] The *Trevino* court noted that *Boyle* "imports into this area of the law . . . a rich case law defining what the government's exercise of discretion is and what it is not." 865 F.2d at 1483; Appendix at 18a.

This Court in *Boyle* could not have intended the first element of the government contractor defense to become so burdened. In his opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing, Circuit Judge Jolly suggested the role of the discretionary function exception:

> Mr. Justice Scalia specifically explained that government "approval" assures that the design is *within the area* where the discretionary function policy would not be frustrated, because it assures that the design feature in question was *considered* by a government officer and not "*merely* by the contractor itself." *Boyle*, 108 S. Ct. at 2518. This explanation appears immediately after the use of the word "approved" and gives it its meaning. That government involvement be "within the area" does not mean that strict compliance with all of the elements of the discretionary function exception is required. Indeed, the Court indicated that the discretionary function exception only "*suggests* the *outlines* of 'significant conflict' between federal interests and state law in the context of government procurement." 108 S. Ct. at 2517.

876 F.2d at 1156; Appendix at 36a (emphasis in original).[8]

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[8] Since *Boyle*, other lower courts have agreed with the view that this Court's use of the discretionary function exception was only intended to provide a basis for conflict to justify the displacement of state law. None have adopted the "discretionary function" approval test required by *Trevino*. *E.g.*, *Harduvel v. General Dynamics Corp.*, No. 87-3705 (11th Cir. July 31, 1989); *Ramey v. Martin-Baker Aircraft Co.*, 876 F.2d 946 (4th Cir. 1989); *accord Niemann v. General Dynamics Corp.*, No. 85-5528 (S.D. Ill. June 28, 1989) (first prong of *Boyle* test does not require production of evidence that government exercised discretionary judgment), *appeal docketed*, No. 89-2755 (7th Cir 1989).

B. To The Extent Some Proof Of Governmental Discretion Is Required By *Boyle*, The *Trevino* Court Failed To Recognize That It Was Present In This Case

Even if this Court did intend for government contractors to show some exercise of discretion by the government to establish approval, there can be no question but that such discretion *was exercised in this case*. The undisputed facts are: (1) the Navy chose itself, rather than General Dynamics, to build the diving chamber from the design and to install it into the U.S.S. GRAYBACK; (2) the Navy discovered the design features at issue when it tested the chamber before placing it in service; (3) the Navy chose to place the chamber into service knowing of the design characteristics at issue; (4) the Navy continued to note, within the first years of its use, the very features that allegedly caused the accident but nonetheless chose to use the chamber as designed; and (5) the Navy chose to address these design characteristics in the chamber not by redesigning it but by training its personnel around these features. All of these conscious and knowing decisions by the Navy represent elections which are the very essence of approval. Thus, even assuming *Trevino*'s use of the discretionary function test is appropriate, the *Trevino* court erred in its application of that test.

In *Boyle* this Court placed no time limits on *when* discretionary acts constituting approval had to be made or *whether* they could be made only through a review of specifications as opposed, for example, to a review of the product itself. In affirming the district court's finding that General Dynamics failed to meet the approval element of *Boyle*, however, the *Trevino* panel focused solely on whether the Navy had exercised its discretion *during the design phase* by substantively evaluating written specifications. 865 F.2d at 1480; Appendix at 11-12a. The Fifth Circuit completely ignored its own statements

which establish without question that the Navy exercised discretion through a series of decisions at various points in time. As the *Trevino* opinion states:

> (1) "[T]he Navy performed all the manufacturing and conversion work on the GRAYBACK." 865 F.2d at 1477; Appendix at 3a.
>
> (2) "The Navy operated the submarine for 13 years without mishap, although Navy personnel noted on at least four occasions that the ventilation valve control was difficult to turn." 865 F.2d at 1477; Appendix at 4a.
>
> (3) "Because both General Dynamics and the Navy knew that the system as designed could create a partial vacuum, and because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers." 865 F.2d at 1487; Appendix at 27a.
>
> (4) "The Navy actually did the manufacturing and conversion work. The defective aspects of the design and the dangers of the vacuum were so obvious that the Navy must be charged with knowledge of the defect; yet the Navy built the diving hangar as designed and operated it for thirteen years." 865 F.2d at 1487 n.13; Appendix at 25a n.13.
>
> (5) "The Navy chose to use the GRAYBACK as designed and dealt with the possibility of a vacuum by training its employees rather than by modifying the submarine. . . . [T]he Navy's method of dealing with the dangers in the design were effective for thirteen years." 865 F.2d at 1488-89; Appendix at 29a.
>
> (6) "The Navy had control over the product and had every opportunity to exercise discretion over the design." 865 F.2d at 1487 n.13; Appendix at 25a n.13.

Assuming *arguendo* that an exercise of discretion is necessary under *Boyle*, the *Trevino* court's view of when

and how this exercise must take place cannot be reconciled with case law addressing that exception even in the Fifth Circuit. *E.g.*, *Gordon v. Lykes Brothers Steamship Co.*, 835 F.2d 96 (5th Cir.) (discretion exercised after the injury-causing asbestos was incorporated into the ships on which plaintiff worked), *cert. denied*, 109 S. Ct. 73 (1988). Indeed, the Fifth Circuit's statement that the Navy had control over the product and had "every opportunity to exercise discretion over the design" acknowledges exactly that: discretionary acts constituting approval are not and should not be arbitrarily limited in time. 865 F.2d at 1487 n.13; Appendix at 25a n.13.

Thus, even assuming this Court intended the discretionary function exception to replace the "approval" element of the government contractor defense, General Dynamics provided more than adequate proof that the government exercised its discretion in this case. The *Trevino* court's requirement that the exercise of discretion can only occur during the design stage has no precedential or rational basis.

C. The *Trevino* Court's Discretionary Function Test Necessarily Requires Second-Guessing Of Military Decision-Making And Ultimately Will Result In Higher Costs To The United States

The *Trevino* court's unwarranted requirement that the first element of the government contractor defense must rise to the level of a "substantive review and evaluation of the relevant design features" is flawed for yet another reason: its detrimental impact on military decision-making and increased costs to the United States. 865 F.2d at 1486; Appendix at 23a. When, as *Trevino* requires, the trier of fact "must locate the actual exercise of the discretionary function," 865 F.2d at 1480; Appendix at 11a, and then must find that this exercise of discretion "involve[s] the use of policy judgment," 865 F.2d at 1480; Appendix at 10a, that trier of fact is inevitably forced to do something specifically prohibited by *Boyle*:

"second-guess" the military's "judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 108 S. Ct. at 2517.[9]

The inquiry that *Trevino* requires in order to "locate the discretion" and determine if it was a "policy level decision" unavoidably leads a court down a slippery slope of delving into military decisions.[10] While the Fifth Circuit advised future triers of fact not to evaluate the "quality" of the government's review, 865 F.2d at 1480-81; Appendix at 11-12a, in fact lower courts will be compelled to do just that. Indeed, in searching for "discretion," even the *Trevino* court itself was drawn into examining the *competence* of the government officials who approved General Dynamics' working drawings. 865 F.2d at 1487 n.12; Appendix at 25a n.12 ("The government's use of *clearly unqualified* individuals to review and approve highly technical design work . . . may be evidence that the government does not intend to exercise design discretion." (emphasis added)).

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[9] As Justice Powell recently stated, writing for the Eleventh Circuit, the judiciary is "the branch of government least competent to review" sensitive military decisions. *Harduvel v. General Dynamics Corp.*, No. 87-3705, slip op. at 3535 (11th Cir. July 31, 1989).

[10] Case law addressing the discretionary function exception confirms this point: Was there—or did there have to be—a "conscious decision" by the military when it approved the defect? *E.g., Kennewick Irrigation District v. United States*, No. 87-4203 *et al.* (9th Cir. July 12, 1989). Was the military acting at an "operational" or "planning level" when it made the choice? *E.g., Myslakowski v. United States*, 806 F.2d 94 (6th Cir. 1986), *cert. denied*, 480 U.S. 948 (1987). Was the military's choice a "traditional government function?" *E.g., Dube v. Pittsburgh-Corning Corp.*, 870 F.2d 790 (1st Cir. 1989). If so, was the choice "susceptible of discretion?" *Id.* As these and other cases show, an extraordinary controversy is rapidly developing among the circuits over the extent to which the government must actually act in order to exercise its "discretion."

In addition to ignoring this Court's admonition against judicial intrusion into military decisions, the *Trevino* court also ignored this Court's stated goal of ensuring that the government does not ultimately bear the burden of these state law tort suits. In *Boyle*, this Court warned that the financial burden of state law tort suits "would ultimately be passed through, substantially if not totally, to the United States itself" if contractors are not protected by the defense. 108 S. Ct. at 2518. The *Trevino* court disagreed: "Actual review and evaluation . . . *does come at a cost* to the government." 865 F.2d at 1480-81 n.5; Appendix at 12a n.5 (emphasis added).

The inevitable second-guessing of military judgments and increased costs to the government resulting from the *Trevino* opinion completely undermines *Boyle*, and, at bottom, starkly reveals the unworkability of importing discretionary function exception case law into the government contractor defense. The difficulty with which the courts have grappled with the parameters of the exception highlights how inappropriate it is as an element of the government contractor defense. The exception does not, as the Fifth Circuit claims, bring a "rich case law" to the government contractor defense. As one court stated, "[r]ather than a seamless web, however, we find the law in this area to be a patchwork quilt." *Blessing v. United States*, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978).

II. THE *TREVINO* COURT'S RIGID DEFINITION OF APPROVAL CREATES A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL

As is discussed above, it appears that the *Boyle* Court never intended the first element of the government contractor defense to be defined by the myriad of case law on the discretionary function exception to the Federal Tort Claims Act. Rather, the reference in *Boyle* to the exception was intended to provide the requisite threshold

conflict for adoption of federal common law. A review of the cases both before and after *Boyle* shows that, with the exception of the Fifth Circuit, the courts below have adopted a simpler, broader approval test which had been established by the majority of the federal circuits prior to *Boyle*.

A. The Fifth Circuit's Limited View Of When And How Approval May Take Place Conflicts With The Law Established By The Federal Circuits Prior To And Unchanged By *Boyle* Regarding Approval

In carefully choosing the words "considered" and "approval" to define the first element of the government contractor defense, this Court in no way suggested that such consideration is limited to a specific point in the design process.[11] The established law in the majority of the federal circuits, unchanged by *Boyle*, recognizes approval in at least four forms:

(1) approval of working drawings or design specifications;[12]

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[11] Although in this Petition General Dynamics argues that "approval" can and did take place *after* the design was complete, General Dynamics in no way admits that approval did not take place *during* the design phase. For example, the Navy, through the Department of Justice, took the position at trial that there was a continuous back and forth discussion between the Navy and General Dynamics during the design stage. In fact, *five* Navy officials at successive levels of seniority formally reviewed and approved the drawings in question, some of which were actually drafted not by General Dynamics personnel but, remarkably enough, by the Navy itself. Thus, essentially the Navy approved its own drawings. Appendix at 63a. Because the Fifth Circuit set forth adequate facts to show that later approval took place, however, General Dynamics has not raised the issue of that earlier approval in this Petition.

[12] *E.g.*, *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989); *Trevino*, 865 F.2d at 1480; *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988).

(2) approval through "back-and-forth" discussions conducted during the design process; [13]

(3) approval through examination and acceptance of a prototype or mock-up; [14] or

(4) approval through extended use of the equipment as produced.[15]

Logically, approval of a design can take place at any point in time prior to the injury at issue; timing is essentially irrelevant. As one court recently stated:

> The Court believes that, contrary to what plaintiff asserts, the relevant time to evaluate the first prong is not limited to the time when the Air Force originally took delivery of the O-2 aircraft. The Air Force's later decisions regarding the equipment may

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[13] *E.g., Harduvel v. General Dynamics Corp.*, No. 87-3705 (11th Cir. July 31, 1989); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985); *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414 (4th Cir. 1986).

[14] *E.g., Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989); *accord In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 123 (3d Cir. 1985) (Army inspection and modification of the prototype aircraft "*alone* is sufficient to satisfy the level of government participation in design so as to constitute 'approval' ") (emphasis added), *cert. denied sub nom.* 474 U.S. 1082 (1986); *Boyle v. United Technologies Corp.*, 792 F.2d at 414-15 (approval proven by the Navy's review and approval of a mock-up aircraft); *see also Tillett v. J.I. Case Co.*, 756 F.2d 591, 599 (7th Cir. 1985) (defendant proves approval element of defense solely on the basis of the government's approval of a prototype, i.e., after design and after construction).

[15] *E.g., Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986) (where Army had been using helicopter, knowing of defect, for over twenty years, approval test is "amply established"), *cert. denied*, 108 S. Ct. 2897 (1988); *see also Harduvel v. General Dynamics Corp.*, No. 87-3705, slip op. at 3540 (11th Cir. July 31, 1989) ("[g]overnment review and approval of design and production methods continued after production began"); *Hendrix v. Bell Helicopter Textron, Inc.*, 634 F. Supp. 1551, 1554 (N.D. Tex. 1986) (court finds military approval of the design because all the allegedly defective helicopters are still in operation).

constitute approval of reasonably precise specifications.

Schwindt v. Cessna Aircraft Co., No. CV485-472, mem. op. at 7 (S.D. Ga. Aug. 31, 1988); *see Harduvel v. General Dynamics Corp.*, No. 87-3705, slip. op. at 3542 (11th Cir. July 31, 1989) (government contractor defense proven where Air Force was aware of design defect and "[d]espite its knowledge . . . continued to fly the hundreds of F-16's in operation, and to purchase additional ones").

In finding that General Dynamics failed to show "approval" by the Navy even where the Navy *knew* of the very characteristics at issue in this case, *accepted* the design with such features, *built* the chamber with these characteristics, and *chose* to train around them for thirteen years, the Fifth Circuit set a standard for "approval" which conflicts with federal circuit case law defining the defense. The *Trevino* court's fixation on one particular indicia of approval—approval of working drawings and whether mere "rubber stamping" took place—ignores the other evidence which the courts before and after *Boyle* have uniformly acknowledged demonstrate approval.

The one definition of approval which is no longer viable after *Boyle* is that previously enunciated by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988). The *Shaw* approval test, like the *Trevino* approval test, focused on whether an *informed* government approval occurred *during* the design phase.[16] Both *Trevino* and *Shaw*

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[16] The *Shaw* test required a showing that: "(1) the contractor did not participate, or only participated minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor *to proceed with the dangerous* design." *Boyle*, 108 S. Ct. at 2518 (emphasis supplied).

require a court to compare the nature and level of contractor and government participation during the design stage. This Court rejected *Shaw*, however, holding that "[w]hile this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the Federal interest embodied in the 'discretionary function' exemption." *Boyle*, 108 S. Ct. at 2518.

It is clear that the *Trevino* result—no approval even in the face of full acceptance with knowledge—cannot coexist with *Boyle* or other case law. As Circuit Judge Jolly stated in his dissenting opinion:

> I agree with the panel that "approve" is not synonymous with "rubber stamp." It does seem to me, however, that when the government furnishes 339 pages of specifications and involves a review team with the plans, "rubber stamp" is not an apt description of the government's involvement. Generally speaking, I would think that in this case if the government *considered* the plans and affirmatively assented to them, it has "approved"; or if the government, in the panel's words, was "charged with the knowledge of the defect" and accepted the design, especially for a period of years with no complaint, it has "approved" contract specifications within the meaning of *Boyle*.

876 F.2d 1156; Appendix at 36a.

B. The Fifth Circuit's Limited View Of When And How Approval May Take Place Conflicts With The Fourth Circuit's Post-*Boyle* Interpretation Of Approval

In addition to conflicting with the broad approval test outlined by the case law prior to *Boyle* and adopted by this Court in *Boyle*, the *Trevino* court's narrow definition of when and how approval can take place conflicts with the Fourth Circuit's interpretation of *Boyle*. In *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989), the Fourth Circuit considered the government

contractor defense, explicitly holding that the approval element of *Boyle* may be established in two ways: (1) proof that the government's review of the specifications was more than a rubber stamp; *or* (2) a showing that the military continued using the product, even though it knew of its defective feature. *Ramey*'s adoption of the traditional broad approval test cannot be reconciled with *Trevino*'s narrow test.

In *Ramey*, the plaintiff was injured while trying to remove an ejection seat from the cockpit of a Navy F-18 fighter aircraft. Martin-Baker Aircraft Company manufactured the ejection seat as a subcontractor to McDonnell Douglas, the designer and producer of the F-18. Defendant Martin-Baker asserted that it was immune from liability based on the government contractor defense, and the district court agreed. *Ramey v. Martin-Baker Aircraft Co.*, 656 F. Supp. 984 (D. Md. 1987), *aff'd*, 874 F.2d 946 (4th Cir. 1989).

On appeal, the Fourth Circuit applied the defense as adopted by this Court in *Boyle*, affirming that the contractor had proven the three elements. With respect to the approval element of *Boyle*, the Fourth Circuit stated that there are "two routes" by which the approval element may be established. The *Ramey* court held that, first, "'[t]he length and breadth of the [military's] experience with the [component]—and its decision to continue using it—amply establish government approval of the alleged design defects.'" 874 F.2d at 950 (quoting *Dowd v. Textron*, 792 F.2d at 412). Second, "the defense will be permitted to a participating contractor so long as government approval of a design 'consists of more than a mere rubber stamp.'" *Id.* (quoting *Tozer*, 792 F.2d at 407-08). The court held that the evidence produced by Martin-Baker established either test, finding *inter alia* that the Navy was aware of the possible hazards of the ejection seat configuration prior to the accident and that the Navy had approved a prototype or "mock-up" of the design. *Id.*

It is the Fourth Circuit's conclusion that Martin-Baker adequately showed approval through the "length and breadth" of the military's experience with the component that directly conflicts with the Fifth Circuit's conclusion that General Dynamics did not. In both cases the Navy approved the design—in *Ramey* through approval of a mock-up, in *Trevino* by building the equipment itself and then actually discovering the design features in question through testing. In both cases, the Navy had prolonged experience with the allegedly defective component. In both cases, the Navy was aware of the possible hazards the component presented. In both cases, the Navy chose to continue using that component with full knowledge. Yet in *Ramey* these facts established approval; in *Trevino* they did not. The incongruity of these two federal circuit court opinions alone is adequate and proper grounds for this Court to grant this Petition for a writ of *certiorari*.

CONCLUSION

As Circuit Judge Jolly stated in his opinion dissenting from the Fifth Circuit's denial of General Dynamics' Petition for Rehearing *En Banc*:

> The United States Supreme Court, only less than a year ago specifically chose to use the word "approve" when it held that "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications." In doing so, the Court selected a less demanding word than any of the synonyms it might have chosen. . . .

876 F.2d at 1155; Appendix at 34a (quoting *Boyle*, 108 S. Ct. 2518).

Historically, the approval element of the government contractor defense has been a simple concept. By overdefining the word, the *Trevino* court has created a morass of confusion unwarranted and unintended by the Supreme Court in *Boyle*. The *Trevino* definition necessarily

draws the judiciary into second-guessing the military, for the court cannot locate the government's exercise of discretion and perform the required analysis of that discretion without probing the quality and character of the military's review. Finally, the *Trevino* definition of approval will discourage contractor participation in the design of military equipment, for under *Trevino* if the contractor undertakes to design military products, the government's discretionary decision-making will virtually make the government a clone for all of the contractor's design choices.

Respectfully submitted,

HERBERT L. FENSTER
Counsel of Record

RAYMOND B. BIAGINI
CHARLOTTE D. YOUNG

McKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for Petitioner
General Dynamics Corporation

Date: September 1, 1989

APPENDICES

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 86-2965, 87-2175

GLORIA TREVINO, *et al.*,
Plaintiffs-Appellees,

v.

GENERAL DYNAMICS CORP.,
Defendant-Appellant.

GLORIA TREVINO, *et al.*,
Plaintiffs,

v.

GENERAL DYNAMICS CORP.,
Defendant-Cross Claim Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Cross Claim Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

Feb. 23, 1989

Herbert L. Fenster, Lawrence M. Farrell, Raymond B. Biagini, Risa H. Rahinsky, McKenna, Conner & Cuneo, Washington, D.C., for General Dynamics Corp.

Michael J. Maloney, Houston, Tex., John Daly, Atty., Robert S. Greenspan, Civ. Div., U.S. Dept. of Justice, Washington, D.C., Wayne Fisher, Houston, Tex., Thomas W. Kopf, U.S. Atty., Beaumont, Tex., Hugh Johnston, Trial Atty., Torts Branch, Civ. Div., Dept. of Justice, Washington, D.C., for Gloria Trevino, et al. and U.S.

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

REAVLEY, Circuit Judge:

The families of Navy divers killed in a Navy submarine diving chamber brought this products liability action under the Death On The High Seas Act, 46 U.S.C. App. § 761 *et seq.*, and the federal Admiralty law, 28 U.S.C. § 1333, against General Dynamics Corporation, the designer of the chamber. General Dynamics also filed a cross-claim against the United States claiming that, in the event it was found liable to the plaintiffs, the United States would be liable to General Dynamics under a contractual indemnification clause. Trial was to the court, which held that General Dynamics was liable for the deaths of the divers and that the United States was not liable to General Dynamics under the indemnification clause. *Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330 (E.D.Tex.1986). We affirm the judgment for the families of the divers against General Dynamics and vacate, for lack of jurisdiction, that part of the judgment favoring the United States on contractual indemnity.

I. Factual Background

On the night of January 16, 1982, five United States Navy divers died in an accident aboard the submarine U.S.S. GRAYBACK. The ventilation valve, which al-

lowed air to enter the flooded diving chamber, was not fully open; and as the divers drained the water, a vacuum formed in the chamber.

The U.S.S. GRAYBACK was designed and constructed in the late 1950s as a missile-carrying submarine. It was equipped with two large cylindrical pressure chambers on its forward deck, which were used as storage hangars for the missiles. In the late 1960s the GRAYBACK was converted to a personnel-carrying submarine capable of dispatching divers underwater. One portion of that conversion was the installation of a diver lock-in/lock-out system in the cylindrical pressure chambers. The Navy established the basic design concept for the modifications to the GRAYBACK in a 339-page circular of requirements ("COR") describing the design concepts, including two pages describing the design of the diving hangar and a one-page diagram of the flood and drain system, and selected Mare Island Naval Shipyard ("MINS") as the site for the design and conversion work.

In 1966 and 1967 the Navy contracted with General Dynamics Corporation Electric Boat Division to do the design work on the diving hangar. The contracts required General Dynamics to produce working drawings of the hangar and the lock-in/lock-out system and to assume full responsibility for all necessary technical research, to review its work product to assure compliance with the COR, and to conduct all quality assurance, including inspection of the end product, before issue to the Navy. General Dynamics supplied 37 employees, who worked on-site at MINS and produced 71 pages of detailed working drawings. Each of the drawings was signed by a government employee in a box marked "approved." After General Dynamics completed the drawings, their employees left MINS, and the Navy performed all the manufacturing and conversion work on the GRAYBACK.

The design concept, as stated in the COR, called for a "control bubble," a plexiglass enclosure that would be lighted and filled with air while the diving hangar was flooded, from which a diver could operate all the controls necessary to drain the diving hangar. General Dynamics's design, however, placed the hand wheel control for the ventilation valve adjacent to, but not controllable from, the control bubble.[1] General Dynamics's design did not include a lighted position indicator on the ventilation valve control, a remote valve position indicator, vacuum gauges, safety interlocks, or any other type of warning or safety device to prevent a vacuum or to notify the divers or the crew inside the submarine ("the dry side") of the presence or possibility of a vacuum. The Navy operated the submarine for 13 years without mishap, although Navy personnel noted on at least four occasions that the ventilation valve control was difficult to turn. The Navy never performed nor required a formal design/safety review of the GRAYBACK's diving system prior to the accident.

Following the accident, the Navy conducted an investigation and concluded that the accident was caused by "a combination of design deficiency, material defect, unsound operating procedures, and personnel error." Specifically, the Navy found the following four design deficiencies: that there was no safety interlock mechanism to prevent the opening of the hangar drain valve when the main vent valve was not fully opened; that the only valve position indicator on the main vent valve was a metal tab that was underwater and could not be seen

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[1] General Dynamics argues that the hand wheel was controllable from the bubble. The plaintiffs concede that a diver could turn the wheel without leaving the plexiglass enclosure but point out that the wheel was under water and that the divers were generally fully submerged when operating the control. It is undisputed that the hand wheel control was not visible from the air bubble. Therefore, we accept the district court's finding that, as a practical matter, the ventilation valve was not controllable from the air bubble.

when draining the hangar; that there was no remote position indicator that could be seen from the dry side of the hangar; and that the general design of the hangar made proper maintenance of the main vent valve extremely difficult, "if not impossible." *Trevino v. General Dynamics Corp.*, 626 F.Supp. at 1332-33. The district court found that both the Navy and General Dynamics were negligent and that the design was dangerously defective. General Dynamics was negligent in failing (1) to provide for a safety interlock device, (2) to provide for a valve position indicator that is visible when draining the hangar, (3) to provide for a remote position indicator that could be seen from the dry side, (4) to design the valve so that proper maintenance was possible, (5) to adhere to the Navy's COR requiring that the vent valve be controllable from the control bubble, (6) to warn the Navy about the dangers associated with the design's potential to create a partial vacuum, and (7) to warn or instruct the Navy concerning the failure to provide for basic safety and warning devices. The Navy was negligent in failing (1) to provide for basic safety features in its COR, (2) to perform sufficient operational testing, (3) to conduct a formal design review of the system, and (4) to properly lubricate and maintain the shaft to the main hangar vent valve. The court attributed 80% of the fault to General Dynamics and 20% of the fault to the Navy.[2] Although many aspects of the faulty de-

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[2] The trial court noted that the finding as to the Navy "is merely superfluous as the Court has already ruled that the United States is immune from the Plaintiff's direct suit under the *Feres-Stencel* doctrine." 626 F.Supp. at 1333. As will be explained hereafter, the district court's findings of negligent conduct by the Navy, with the exception of its finding that the Navy failed to properly lubricate and maintain the shaft, are also superfluous because these acts by the Navy are discretionary functions. The Navy may delegate the design and testing of military equipment to a private contractor, and the Navy need not perform a design or safety review of the

sign and the improper maintenance of the system contributed to the accident, the fundamental design defect was that the design of the hangar made it impossible for the diver who was draining the system to know whether the vent valve was fully open and that there was no back-up system of any sort to prevent a vacuum or to warn the diver or the crew if the diver did begin to drain the hangar while the vent valve was partially closed. None of the parties on appeal question the correctness of the finding that the design was defective.

The parties do dispute whether General Dynamics, as a government contractor, is responsible for the injuries caused by its defective design. The principal question presented in this case is what are the contours of the government contractor defense recognized by the United States Supreme Court in *Boyle v. United Technologies Corp.*, —— U.S. ——, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

II. A Government Contractor's Derivative Immunity

Prior to the *Boyle* decision, this circuit and others had recognized under federal common law a defense that protected government contractors from liability in products liability actions based on injuries to servicemen caused by defectively-designed military equipment. *See Bynum v. FMC Corp.*, 770 F.2d 556, 574 (5th Cir. 1985); *see also Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986), *cert. denied*, —— U.S. ——, 108 S.Ct. 2897, 101 L.Ed.2d 931 (1988); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 738 (11th Cir. 1985); *In re Air Crash Disaster at Mannheim Germany on Sept. 11, 1982*, 769 F.2d 115, 122 (3d Cir. 1985), *cert. denied, Schoenborn v. Boeing Co.*, 474 U.S. 1082, 106 S.Ct. 851, 88 L.Ed.2d 891 (1986); *Tillett v. J. I. Case Co.*, 756 F.2d 591, 597 (7th

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contractor's work. The government is not answerable in court for its delegation of these decisions when the contractor is negligent.

Cir. 1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). This immunity for government contractors was derived from the government's immunity under the *Feres-Stencel* doctrine.[3] *See Bynum*, 770 F.2d at 565; *see also McKay*, 704 F.2d at 449 ("The reasons for applying the government contractor defense to suppliers of military equipment with design defects approved by the government parallel those supporting the *Feres-Stencel* doctrine."). *Bynum* established the following elements for the government contractor defense:

> To establish the government contractor defense, a military contractor must first demonstrate that the government is immune from liability under the *Feres-Stencel* doctrine. . . . Second, the military contractor must prove that the government established reasonably precise specifications for the allegedly defective military equipment and that the equipment conformed to those specifications. . . . Finally, it must be shown that the military contractor warned the government about errors in the government specifications or dangers involved in the use of the equipment that were known to the contractor but not to the government.

770 F.2d at 574. The primary purpose behind this formulation of the defense is to prevent the contractor from being held liable when the government is actually at fault

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[3] *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), held that a soldier may not sue the United States for injuries caused by the negligence of his superior officers or the government if those injuries were incident to his military service. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), extended *Feres* and held that the United States is immune from liability to a government contractor for contribution or indemnity when a soldier has recovered against a government contractor for injuries partially caused by the negligence of the government.

but is protected by the *Feres-Stencel* doctrine. *See* id. at 565.

A. The *Boyle* Defense

The Supreme Court in *Boyle v. United Technologies Corp.*, —— U.S. ——, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), recognized the government contractor defense. The Court's opinion began with fundamentals, noting that state tort law is preempted by federal common law in areas of unique federal interests and holding that the procurement of equipment by the United States is such an area. *See id.* 108 S.Ct. at 2513-15. The scope of the displacement of state law is defined by the elements of the defense that the Court adopted.

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 2518. The Court specifically rejected the *Feres-Stencel* doctrine as the basis for this defense, and instead grounded the defense in the policies underlying the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). *Id.* at 2517.

With the exception of discarding the first *Bynum* element, the Supreme Court's articulation of the elements of the government contractor defense is virtually identical to the existing Fifth Circuit law. As we noted recently, the *Boyle* opinion "does not change the law in this and other Circuits, except to reject the ideological basis for contractor immunity based upon the *Feres* doctrine." *McGonigal v. Gearhart Indus., Inc.*, 851 F.2d 774, 777 (5th Cir. 1988). Yet that change may be significant. The

discretionary function exception, 28 U.S.C. § 2680(a), excepts from the FTCA consent to suit "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." The Supreme Court noted that this statutory provision "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of government procurement" and held that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision." 108 S.Ct. at 2517. The Supreme Court's rejection of the *Feres-Stencel* doctrine as the basis for the defense means that the purpose behind the three elements of the defense is not the attainment of the policies identified in *Feres* and in *Bynum*, but deference to the discretionary functions of the government.

The district court applied the three elements of the defense almost exactly as stated in *Boyle*. *See* 626 F. Supp. at 1334-35. Although government employees signed each page of the working drawings indicating their approval of the design, the district court held that "the level of review here was not sufficient to constitute 'approval.'" *Id.* at 1336. Thus, this case presents the question, unresolved by the Supreme Court, of what constitutes "approval" under the first element of the *Boyle* defense.

B. "Approval" Under *Boyle*

Assuming for the moment that the signatures denoting government approval of General Dynamics's designs were made without any sort of review or evaluation of the designs, that they were mere bureaucratic rubber stamps, that they signified at most the government's decision to allow General Dynamics to make all of the important design choices and the government's confidence in Gen-

eral Dynamics's ability to do so, would such "approval" be sufficient to satisfy the first element of the *Boyle* defense? The majority in *Boyle* did not define approval, but the dissent clearly feared such a possibility arising from the majority's formulation of the defense: "Respondent is immune from liability so long as it obtained approval of 'reasonably precise specifications'—perhaps no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them." *Boyle*, 108 S.Ct. at 2519 (Brennan, J., dissenting).[4] Actually, the sufficiency of the government approval was not an issue in *Boyle*. The Fourth Circuit had noted that the Navy and the contractor had worked closely together on the design, that there was abundant evidence of back-and-forth discussions and exchange of information between the contractor and the Navy, and that the Navy had reviewed fully and had approved the final design. *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414-15 (4th Cir. 1986), *aff'd*, —— U.S. ——, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

We hold that "approval" under the *Boyle* defense requires more than a rubber stamp. First, the Court's rejection of the *Feres-Stencel* doctrine in favor of the discretionary function exception as the basis for the defense tells us that the purpose of the defense is to protect the discretionary functions of the government and that, therefore, approval under the defense must constitute a discretionary function. Second, our reading of the case law defining the notion of a "discretionary function" reveals that not all government acts involving some element of choice are discretionary functions, but only those that involve the use of policy judgment. When the gov-

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[4] In *Bynum*, we also left this question open by refusing to decide what level of government participation in generating design specifications was necessary to satisfy the approval requirement. *See* 770 F.2d at 574 n. 23.

ernment merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not a discretionary function; therefore, a rubber stamp is not "approval" under *Boyle*.

In considering the first element of the *Boyle* defense in a case like this one, the trier of fact will determine whether the government has exercised or delegated to the contractor discretion over the product design. The government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion when it buys a product designed by a private manufacturer; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government. If the government delegates the design discretion to the contractor, the exercise of that discretion does not revert to the government by the mere retention of a right of "final approval" of a design nor by the mere "approval" of the design without any substantive review or evaluation of the relevant design features or with a review to determine only that the design complies with the general requirements initially established by the government. The mere signature of a government employee on the "approval line" of a contractor's working drawings, without more, does not establish the government contractor defense. The trier of fact should not evaluate the wisdom or quality of any government decision, but must locate the actual exercise of the discretionary function. If the government contractor exercised the actual discretion over the defective feature of the design, then the contractor will not escape liability via the government contractor defense—the gov-

ernment's rubber stamp on the design drawings notwithstanding.[5]

That *Boyle* requires more than a rubber stamp is clear from its formulation of the elements of the defense, each of which serve to locate the exercise of discretion in the government. Under the first element the government must approve *reasonably precise specifications.* The requirement that the specifications be precise means that the discretion over significant details and all critical design choices will be exercised by the government. If the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor. The same is true for the second element, which requires that the equipment conform to the specifications. If the contractor were free to deviate from the government's specifications, then dis-

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[5] General Dynamics takes issue with the trial court's conclusion that under any other reading of the approval requirement "the government contractor's defense would seem always to apply and contractors would never be liable for a defective product because the government would always be in a position to approve a contractor design." 626 F.Supp. at 1337. But the district court was correct. If the signature of a government employee on a design drawing in a box marked "approved" establishes the first element of the government contractor defense as a matter of law, government contractors would make sure that they would never face liability for defective design of military equipment merely by bargaining for a guarantee that some federal employee would place his signature at the bottom of every sheet of paper involved in the design of a product and thus confer the government's "approval." Such a provision likely would be agreed to by the government because it would come at absolutely no cost. Actual review and evaluation of design decisions, however, does come at a cost to the government. That is why the government must decide whether to exercise the design discretion itself or to delegate that discretion to the government contractor. As the district court noted "[i]n the real world, although the government and the contractor may jointly work together in producing specifications, the level of participation always varies. Sometimes the government's participation is minimal at best. That is the very case here." *Id.*

cretion over the design choices would be exercised by the contractor, not by the government.[6] *Boyle* noted that "[t]he first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." 108 S.Ct. at 2518.[7] It would be absurd, then, to fashion a rule that allowed liability when the specifications were not sufficiently precise or when the contractor deviated from the specifications while disallowing liability when the federal officer signing the design approval did not review or understand the specifications or care whether the contractor deviated from them. As we noted in *Bynum*, the purpose of the test is to deny the defense to a government contractor 'that is itself ultimately responsible for the design defect." 770 F.2d at 574.

The third element of the *Boyle* defense requires that the government contractor warn the government when

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[6] It could be asserted that the second element functions only to remove the government contractor defense for manufacturing defects, and is not about discretion at all. But *Boyle* specifically stated that the three elements established a defense to "[l]iability for design defects in military equipment." 108 S.Ct. at 2518. A manufacturer is liable for manufacturing defects no matter who designed or approved the specifications. As we noted in *McGonigal*, "military contractor immunity does not apply in cases of defective manufacture." 851 F.2d at 777.

[7] The Supreme Court's use of the terms "approved" and "considered" is unfortunate. Taken out of context these terms might suggest that a rubber stamp is sufficient. But we must note that the term "considered" is linked in the sentence to the notion of a discretionary function and is meant to indicate that the government has exercised discretion. The exercise of a discretionary function cannot be equated with a rubber stamp approval. Moreover, the Court's statement indicates that the government's cognizance of the relevant design features must be on a par with that of the government contractor. At a minimum, the federal officer approving the design must not only sign it but know what is there.

the contractor has information which the government lacks. This element clearly contemplates that the government's approval of the design will involve informed decisions and considered choices. As we noted in *Bynum*, the primary purpose of the warning element is "to enable the government to make determinations as to the design and use of military equipment based on all readily available information." *Id.* at 574. The Court's inclusion of a warning element must indicate that approval requires some level of evaluation and review; otherwise a government contractor might argue one day that it should have the benefit of the defense despite its failure to give a warning because the government had rubber-stamped the design, because the information withheld would have been of no use to the government and was not desired by the government, and because the provision of the information would not have affected the government's "approval" of the design. The Supreme Court noted that the warning requirement prevents the defense from creating an incentive to withhold information: "We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decisions." 108 S.Ct. at 2518. That purpose would be a farce if the government could approve specifications without evaluating them.

In discussing the federal interests involved, *Boyle* gives two hypothetical cases in which the government contractor defense would not apply. First, if the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity but not the precise manner of the construction, and the state law required a duty of care to include a certain safety feature, "no one suggests that state law would generally be preempted in this context." 108 S.Ct. at 2516. Second, if a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped

with improperly designed escape hatches, the government's order would not establish its significant interest in that particular design. "That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered." *Id.* These examples do not square with an interpretation of the *Boyle* defense that contemplates approval without evaluation. In both cases the government has no interest in the defective design feature because the contractor, not the government, exercised discretion over the design choice. If discretion is unimportant to approval, if the government may approve by rubber stamp, then the government ought to be able to approve the design by accepting and using the air conditioning unit or by ordering and accepting delivery of the helicopters. *Boyle* clearly indicates that such "approval" would be insufficient.

Decisions in the circuit courts prior to *Boyle* also support our holding. The Third Circuit flatly held that the government's approval must consist of "more than a mere rubber stamp." *In re Aircrash Disaster*, 769 F.2d at 122. The Third Circuit held that the government's approval of a design satisfies the first element of the government contractor defense if it comes "after a substantive review of the specifications." *Id.* at 123. The case of *Shaw v. Grumman Aerospace Corp.*, 593 F.Supp. 1066 (S.D.Fla.1984), *aff'd*, 778 F.2d 736 (11th Cir.1985), *cert. denied*, —— U.S. ——, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), presents almost exactly the same relationship between the United States Navy and a military contractor as we find in the present case. *Shaw* concerned defects in the design of the Navy's A-6 aircraft. The district court found that the Navy provided general performance, mission and criteria specifications to Grumman, that Grumman exclusively designed the aircraft and submitted the detailed specifications to the Navy, that

the Grumman drawings were routinely examined and approved by Navy personnel, that the Navy did not evaluate the design data or check the accuracy or compliance of the drawings, that Grumman in fact had final control of the design of the aircraft, that Grumman decided to use a defectively-designed stabilizer system on the aircraft, and that the Navy was not aware of the design defect at the time of approval. *Id.*, 593 F.Supp. at 1070-73. Moreover, after the defect was discovered by the Navy, the Navy requested Grumman to solve the problem. Grumman designed "self-retaining bolts" for the stabilizer system, and the Navy installed them as instructed, but this modification was also defective. 778 F.2d at 738. Although the district court explicitly found the Navy had approved the defective design, both the district court and the Eleventh Circuit discounted that approval because it was merely a rubber stamp. The Eleventh Circuit noted that the Navy "relied" on Grumman's advice and that the approval did not constitute an "informed military decision." *Id.* at 747. The Eleventh Circuit affirmed the holding that the military contractor defense was not available to Grumman, but that court went further and changed the elements of the defense. The new defense did not examine the exercise of discretion but keyed immunity to the level of contractor participation in the design process. *See id.* at 746.

The Supreme Court in *Boyle* specifically rejected the Eleventh Circuit's formulation of the military contractor defense: "[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." 108 S.Ct. at 2518. *Boyle* rejected the *Shaw* formulation of the defense because it was not "designed to protect the federal interests embodied in the 'discretionary function' exception." *Id.* But the Supreme Court never indicated that the result

reached in *Shaw* was incorrect.[8] The district court in *Shaw* had applied the formulation of the defense that was adopted in *Boyle* and held the Navy's "approval" of the A-6 was insufficient to satisfy the government contractor defense. *See* 593 F.Supp. at 1074.

Not only does a careful analysis of the elements of the government contractor defense suggest that a rubber stamp is insufficient approval, the Supreme Court's rejection of the *Feres-Stencel* doctrine and recognition of the discretionary function exception as the basis for this defense mandates that result. In *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir.1983), the Ninth Circuit was confronted with an older case that had apparently conditioned the government contractor defense upon the exercise of design discretion. In *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir.1961), a private firm had contracted with the government to build a dam, and the contract had specified the location, height, and some performance requirements of the upstream cofferdam but left the design, materials and method of construction to the discretion of the contractor. The Ninth Circuit held that the government contractor defense was not available to shield the contractor from liability for damages caused by the collapse of the defective cofferdam. *Id.* at 15-16. The *McKay* court concluded "[u]nder these circumstances, *Merritt, Chapman* properly precludes the government contractor rule. When only minimal or only very general requirements are set for the contractor by the United States the rule is inapplicable." 704 F.2d at 450. But the *McKay* court went on to hold that "[t]he situation is different where the United States *reviewed and approved* a detailed set of specifications." *Id.* (emphasis added). But

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[8] In fact, the Supreme Court denied the petition for writ of certiorari, —— U.S. ——, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), and a petition for rehearing, —— U.S. ——, 109 S.Ct. 10, 101 L.Ed.2d 961 (1988), in the *Shaw* case after its decision in *Boyle*.

the question remained how much review is necessary and what constitutes approval. The Ninth Circuit held that "[i]t is at this point that the *Feres-Stencel* doctrine comes sharply into focus," *id.*, and concluded that the *Feres-Stencel* doctrine required a broader application of the rule than *Merritt, Chapman* might suggest, *id.* 704 F.2d at 450-51. Yet, the Supreme Court in *Boyle* rejected *Feres-Stencel* as the basis of the government contractor defense both because it was too narrow in that it did not cover suits by civilians and because it was too broad in precluding recovery for some injuries that were not in any way the result of the exercise of government discretion. *See Boyle*, 108 S.Ct. at 2517. *Boyle* rejected the *Feres-Stencel* doctrine because it defines the federal interests in terms of the military subject matter of the case, regardless of whether any discretion was exercised by the government.

The Supreme Court's choice of the discretionary function exception is also important because it imports into this area of the law the policies underlying that provision, which are quite different from those underlying the *Feres-Stencel* doctrine, and a rich case law defining what the government's exercise of discretion is and what it is not. The *Feres-Stencel* doctrine is strictly based on separation of powers concerns and the need to prevent any sort of "second-guessing" of military orders by civilian courts. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 2059, 52 L.Ed.2d 665 (1977).[9] The discretionary function exception also seeks to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in

[9] *See also Tozer*, 792 F.2d at 406 (holding that the pre-*Boyle* military contractor defense is heavily dependent on *Feres* doctrine considerations and that the defense seeks to prevent courts from second-guessing military decisions); *Bynum*, 770 F.2d at 563 (same).

tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S.Ct. 2755, 2765, 81 L.Ed.2d 660 (1984). However, this policy is balanced against the "broad and just purpose" of the FTCA to compensate victims of negligence in the conduct of governmental activities. *Indian Towing Co. v. United States*, 350 U.S. 61, 68, 76 S.Ct. 122, 126, 100 L.Ed. 48 (1955).

Courts have found it "unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception." *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764; *see also Williamson v. United States Dept. of Agric.*, 815 F.2d 368, 374-75 (5th Cir.1987) (noting the difficult task of divining the boundaries of governmental discretion). The Supreme Court has held that the discretionary function exception turns on "the nature of the conduct, rather than the status of the actor," that the provision covers acts by all federal employees, regardless of rank, if the challenged acts are of the "nature and quality" to fall within the exception. *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764. The court must determine whether the judgment exercised is of the kind that the discretionary function exception was designed to shield. *Berkovitz by Berkovitz v. United States*, —— U.S. ——, 108 S.Ct.1954, 1959, 100 L.Ed.2d 531 (1988). The courts have been adamant about one point, however: not all decisions made by government employees are covered by the discretionary function exception. "Every act of a rational being involves some choices," and the discretionary function exception must be read carefully or it will totally insulate the government from tort liability. *Collins v. United States*, 783 F.2d 1225, 1233-34 (5th Cir.1986) (Brown, J., concurring). Courts have generally drawn a line between decisions at a planning level, or decisions that exercise policy judgment, and decisions at a operational level, or decisions that are merely incident to carrying out a govern-

ment policy. *See Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S.Ct. 956, 968, 97 L.Ed. 1427 (1953). "Discretionary decision-making . . . is accompanied by non-discretionary acts of execution, whether termed operational, ministerial, or clerical." *Payton v. United States*, 679 F.2d 475, 480 (5th Cir. Unit B 1982) (en banc). Once the government makes a discretionary decision, the discretionary function exception does not apply to subsequent decisions made in the carrying out of that policy, "even though discretionary decisions are constantly made as to how those acts are carried out." *Wysinger v. United States*, 784 F.2d 1252, 1253 (5th Cir.1986). The decisions of this circuit have been extraordinarily careful to avoid any interpretation of the discretionary function exception that would embrace any governmental act merely because some decision-making power was exercised by the official whose act was questioned. *See, e.g., Denham v. United States*, 834 F.2d 518, 520 (5th Cir.1987) (noting that the "government's approach would subsume practically any decision within the discretionary function exception and thereby vitiate the FTCA"); *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.) (noting that a broader reading of the exception would destroy the "corpuscular vitality" of the Federal Tort Claims Act), *cert. denied*, 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967).

Although the planning/operational distinction does not always work, a government decision, at a minimum, must involve judgment or policy choice to fall within the discretionary function exception. *See Berkovitz*, 108 S.Ct. at 1958-59; *Dalehite*, 346 U.S. at 34, 73 S.Ct. at 967. The discretionary function exception "properly construed, therefore protects only governmental actions and decisions based on considerations of public policy"; discretionary decisions involve "the permissible exercise of policy judgment." *Berkovitz*, 108 S.Ct. at 1959. The *Boyle* Court noted that the selection of the appropriate

design for military equipment to be used by our armed forces is a discretionary function because it involves "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 108 S.Ct. at 2517.

In discretionary function cases, the Supreme Court has recognized that a government agency may delegate its discretion to private parties. In *Varig Airlines*, the government answered a suit against the FAA for certifying a dangerously defective plane that the responsibility for safety rests with the airplane manufacturer and that the government may enforce those safety standards with "spot checks"; the Court agreed and held that the government's decision to use spot checks was a discretionary function. 467 U.S. at 815, 104 S.Ct. at 2765. The Court specifically noted that the discretionary function exception protects "policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer." *Id.* at 820, 104 S.Ct. at 2768. In fact, the *Boyle* Court noted that "[t]he design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design." 108 S.Ct. at 2518.[10]

If the government has chosen to delegate its design discretion to a private contractor, however, the govern-

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[10] It must be noted that, although the government's decision to delegate its discretion on a matter to a private contractor is itself a discretionary function, that is not the discretion with which the government contractor defense is concerned. The discretionary function at issue in the government contractor defense is that discretion involved in "selecti[ng] the appropriate design for military equipment to be used by our armed forces." 108 S.Ct. at 2517. The three elements of the government contractor defense determine whether the government exercised the *design* discretion or delegated that discretion to the government contractor.

ment does not exercise a discretionary function by merely approving the contractor's work. This circuit confronted that issue in *Butler v. United States*, 726 F.2d 1057 (5th Cir.1984). In *Butler* the families of eight persons who had drowned in an underwater depression created by an Army Corps of Engineers project sued the government and the private contractors that had performed work for the Army Corps of Engineers. The project was the repair of a seawall in Hancock County, Mississippi, that was damaged in a hurricane. The sand needed for the repair was obtained by the dredging the Mississippi Sound, thereby creating a depression in shallow water near a popular beach. The Army Corps of Engineers contracted out the operation to Farrell Construction Co., who subcontracted parts of it to two other companies. The contract provided that the Army Corps of Engineers would retain ultimate control, would approve all plans, shop drawings, construction practices, methods and materials and that completion of the project was subject to the inspection and acceptance by the Corps. The contract also required the posting of warning signs for swimmers. The suit alleged that the warnings were inadequate. *See id.* at 1059-60. In determining the government's liability, this court held that the preparation of the contract was a discretionary function but that the "controlling, supervising, contracting and carrying out of the contract" were not discretionary; those actions were operational in nature and did not enjoy immunity under the discretionary function exception. *Id.* at 1062. This court held that the decisions by the Army Corps of Engineers to repair the seawall and to dredge the sound were discretionary, but "once these decisions were made, the Government was no longer exercising a discretionary function." *Id.* at 1063. This is not to say that it is impossible for the government to exercise a discretionary function when supervising a private contractor, but only that once the government has delegated authority to the private contractor to make important choices, the gov-

ernment does not exercise a discretionary function by merely accepting the contractor's work.[11]

To summarize: The government contractor defense as reformulated in *Boyle* protects government contractors from liability for defective designs if discretion over the design feature in question was exercised by the government. If the government delegates its design discretion to the contractor and allows the contractor to develop the design, the government contractor defense does not apply. If the government has so delegated its discretion to the contractor, mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on substantive review and evaluation of the contractor's design choices. A mere rubber stamp by a federal procurement officer does not constitute approval

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[11] Our recent case of *Gordon v. Lykes Bros. S.S. Co.*, 835 F.2d 96 (5th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 73, 102 L.Ed.2d 50 (1988), illustrates this point. During World War II, the United States decided to operate a fleet of merchant ships, and the government gained control of ships that had been built by private manufacturers and previously owned by private parties and that had asbestos insulation. The government continued to operate these ships and expose the sailors to asbestos fibers, and the government did not institute any sort of safety program. Some of the *Gordon* plaintiffs sued for injuries caused by this exposure to asbestos. Although the decisions that caused the sailors to be exposed to asbestos were seemingly operational, and indeed the decision to incorporate asbestos into the design of these ships was made by private parties prior to the government's gaining control of them, this court held that the government's decisions to expose sailors to asbestos fibers fell within the discretionary function exception. *Id.* at 99. This holding, however, was based on "a substantial amount of historical evidence" showing that the decision to expose U.S. sailors to asbestos was a considered policy choice. *Id.* at 100. Although the result is unusual, *Gordon* does not mark a departure in Fifth Circuit discretionary function law. *Gordon* suggests that the government can exercise discretion in approval only if the government reviews and evaluates the choices made by the private contractor.

and does not give rise to the government contractor defense.

C. The District Court's Application of the Defense

General Dynamics argues that the Navy approved the design specifications set forth in each of the General Dynamics' working drawings, and points to the signature of a government official in a box marked "approved" at the bottom of each of the working drawings. The district court, however, found that "the level of review here was not sufficient to constitute 'approval'." 626 F. Supp. at 1336. The district court held that contracts "left design entirely to the discretion of General Dynamics. The Navy set only general performance standards leaving the details to General Dynamics." *Id.* at 1335-36. The district court held that the COR promulgated by the Navy was "silent" on the questions of the precise location of the main hangar vent valve and the use of warning or safety devices. "The evidence shows that such determinations were left to the discretion and expertise of the General Dynamics designers assigned to prepare the working drawings." *Id.* at 1336. These findings are not clearly erroneous. The record reveals that Navy personnel at MINS assigned a relatively low priority to the GRAYBACK work and delegated their design discretion to General Dynamics. Paul Lawrence, the section leader of the Navy group in charge of the hangar flood and drain system design for the GRAYBACK, wrote in a memo to his superiors at MINS in 1969: "The design work on the GRAYBACK was initially given a low work priority due to more important shipyard work. . . . Due to this extremely heavy workload the piping branches were required to assign less experienced engineers/technicians to GRAYBACK than would normally be assigned. In many cases, farm-in personnel were used to man the GRAYBACK work. . . . Most of the GRAYBACK design work was accomplished by farm-in contractor personnel and not checked by Mare Island experienced technical peo-

ple."[12] After the accident, the Navy investigation concluded that one of the problems with the GRAYBACK design was the absence of a formal Navy design review.[13] Because the record clearly shows that "General Dynamics, rather than the government, was ultimately responsible for the design defects in the [diving] hangar aboard the GRAYBACK," *id.* at 1338, the district court was correct in holding that the approval element of the government contractor defense was not satisfied.

The district court noted that the second element, that the product comply with the design specifications, was not implicated in this case because General Dynamics only did the design work, not the manufacturing of the

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[12] The district court also noted the "disparity in the level of experience between the Navy and General Dynamics." It held that this imbalance of knowledge prevented the Navy from undertaking any substantial review of the specifications. 626 F.Supp. at 1337. It is not for the court to undertake to evaluate the quality of the government's review. The only factual question is whether the government actually exercised design discretion. If the government intended to exercise its discretion over the design of a product and a government official undertakes to substantially review, evaluate, and then approve the design, the first element of the *Boyle* test is satisfied even if the government official doing the review was incompetent or negligent. The government's use of clearly unqualified individuals to review and approve highly technical design work, however, may be evidence that the government does not intend to exercise design discretion but is merely rubberstamping the contractor's design specifications. That seems to be the case here.

[13] It must be emphasized that the absence of review is critical in this case. The Navy actually did the manufacturing and conversion work. The defective aspects of the design and the dangers of the vacuum were so obvious that the Navy must be charged with knowledge of the defect; yet the Navy built the diving hangar as designed and operated it for thirteen years. The Navy had control over the product and had every opportunity to exercise discretion over the design. This the Navy did not do. Both the Navy investigation and the district court faulted the Navy for its *failure* to exercise discretion over the design.

product. *Id.* at 1337-38. Furthermore, it is undisputed that the Navy in converting the GRAYBACK followed General Dynamic's specifications exactly. The district court noted, however, "that the system as designed by General Dynamics *did not even* conform to the general requirements provided by the government." *Id.* at 1338. Under the General Dynamics design the vent valve was not controllable from the air bubble as required by the COR. This finding does not go to the second element because the working drawings, not the COR, were the reasonably precise specifications.[14]

The district court also held that General Dynamics had failed to prove the final element of the defense, that it had warned the government about the dangers in the use of the equipment that were known to the contractor but not to the United States. The district court committed two errors in this holding. First, it held General Dynamics to a duty to warn the government of dangers about which it "knew or should have known." After *Boyle* a government contractor is only responsible for warning the government of dangers about which it has actual knowledge. Second, the district court held that General Dynamics should have warned the Navy of the possibility that a vacuum would form while draining the diving hangar, even though both the Navy and General Dynamics knew or should have known of the dangers associated with the system's potential to create a partial vacuum. After *Boyle*, a government contractor only has

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[14] The Navy did undertake to review the working drawings for compliance with the COR but approved the drawings even with this alleged noncompliance. It is important to note, however, that such review, mere review for compliance with very general performance criteria, is insufficient to satisfy the first element of *Boyle*. If the government sets very general criteria for a design and delegates its design discretion over all of the critical details to a government contractor, the government does not exercise design discretion by merely reviewing the completed design for compliance with the general criteria.

the duty to warn the government of dangers of which it has knowledge but the government does not. Because both General Dynamics and the Navy knew that the system as designed could create a partial vacuum, and because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers. Because the Navy delegated its design discretion to General Dynamics, however, and thus never approved reasonably precise specifications within the meaning of *Boyle*, the district court's holding that the government contractor defense was not available to General Dynamics in this case was correct.

III. The Borrowed Servant Doctrine

General Dynamics alternatively argues that its employees who worked on the design of the GRAYBACK at MINS were borrowed servants of the Navy and therefore the Navy, and not General Dynamics, was responsible for their defective design choices. The district court, however, held that "General Dynamics was an independent contractor given discretionary, independent decision-making authority and, therefore, its employees were not borrowed servants of the government." 626 F. Supp. at 1340. Whether an employee of one is a "borrowed servant" of another is a factual question. Among the considerations for determining whether a servant has been borrowed by another employer are who has control over the employees and the work he is performing, beyond mere suggestion of details or cooperation; whose work is being performed; and who pays the employee. *See Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 376 (5th Cir. 1985). No one factor or combination of factors is decisive and no test has been fixed to determine the existence of a borrowed servant relationship. *Id.* The degree of control an employer has over the employee and the employee's work, however, has generally been considered to be the most important of the considerations.

See West v. Kerr-McGee Corp., 765 F.2d 526, 530-31 (5th Cir. 1985); *Hebron v. Union Oil Co. of California*, 634 F.2d 245, 247 (5th Cir. Unit A Jan. 1981).

The district court's findings of fact on the government contractor defense largely answer this issue as well. The Navy contracted with General Dynamics to have General Dynamics perform a specific task for the Navy and delegated the Navy's design discretion over the GRAYBACK conversion to General Dynamics. The Navy did not, therefore, control the work of General Dynamics or its employees. The district court also found it significant that the Navy hired General Dynamics specifically because its employees were experienced and would not need supervision, that the Navy did not intend to control or supervise the particulars or actual details of the General Dynamics employees' work, that the Navy did not direct the tasks of General Dynamics's employees but spelled out specifically their duties in a contract, that General Dynamics maintained its employer/employee relationship and retained the obligation to pay its employees, and that General Dynamics maintained an administrative structure among its employees while they were at the MINS facility. 626 F. Supp. at 1339-40. The district court's findings are not clearly erroneous.

IV. The Navy's Negligence

General Dynamics next argues that the district court's findings of causation were clearly erroneous and that the negligence of the United States Navy was the sole cause of the accident. Under Texas law, "[t]he act of a third person which intervenes and contributes a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer if that act ought to have been foreseen." *Clark v. Waggoner*, 452 S.W.2d 437, 440 (Tex.1970). General Dynamics, however, notes that under § 452(2) of the *Restatement (Second) of Torts* (1965) the duty to prevent harm to another threat-

ened by the actor's negligent conduct may be shifted to a third party if, because of the lapse of time, the magnitude of the risk of harm, the character and position of the third party, his knowledge of the danger or his relationship to the plaintiff, the failure of the third party to prevent the harm is a superseding cause. It is unclear whether Texas recognizes § 452. *Cf. French v. Grigsby*, 571 S.W.2d 867, 867 (Tex.1978) ("Since the advent of comparative negligence with the adoption of art. 2212a, Tex. Rev. Civ. Stat. Ann., this court has sought to abolish those doctrines directed to the old choice between total victory and total defeat for the injured plaintiff.")

General Dynamics's design was negligent; however, the Navy knew or reasonably should have known of the dangers inherent in the design. The Navy chose to use the GRAYBACK as designed and dealt with the possibility of a vacuum by training its employees rather than by modifying the submarine. Furthermore, the Navy exacerbated the dangers by failing to lubricate the shaft of the valve properly, making it more difficult to turn and more likely that a diver would not realize that it was partially closed. Nevertheless, the Navy relied on General Dynamics's design expertise, and that reliance and the Navy's use of the defective design were foreseeable by General Dynamics. Moreover, the Navy's method of dealing with the dangers in the design were effective for thirteen years. The district court held that the Navy's negligence was not the sole cause of the accident and that the circumstances of the Navy's negligence were not of such a character as to sever the chain of causation and shift all responsibility from General Dynamics to the Navy. The district court found that both the Navy and General Dynamics were negligent and assigned 80% of the fault to General Dynamics and 20% of the fault to the Navy. We cannot say that those findings are clearly erroneous.

V. The Indemnification Agreement

The contracts between General Dynamics and the United States provide that the government will indemnify General Dynamics for liabilities arising out of the performance of the contract. The district court held that General Dynamics had failed to satisfy one of the conditions of the contract and was therefore not entitled to indemnification from the government. We hold, however, that the district court was without jurisdiction to consider this question, and we therefore vacate the judgment on this issue.

General Dynamics's claim is a contract claim, and the essence of the claim is to obtain money from the government. The action must proceed, therefore, under the applicable provisions of federal statutes regarding government contracts. *See Amoco Production Co. v. Hodel*, 815 F.2d 352, 361 (5th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 2898, 101 L.Ed.2d 932 (1988). General Dynamics's claim is controlled by the Contract Disputes Act. 41 U.S.C. § 601 *et seq.* Under the Act, § 609(a)(1), a contracting party may bring an action directly on the contract claim against the United States after an adverse decision by a contracting officer concerning the claim. All claims by a contractor against the United States relating to a contract must be submitted in writing to a contracting officer for a decision. 41 U.S.C. § 605(a). General Dynamics never did so prior to filing this counter-claim against the United States. General Dynamics claims that its tender of a defense of this action to the United States Justice Department constituted a claim to a contracting officer. A contracting officer, however, is defined as a person who has the authority to enter into and administer contracts and make determinations and findings with respect thereto. 41 U.S.C. § 601(3). The Justice Department certainly cannot enter into contracts for the Navy and is not a contracting officer for the purposes of the Contract Disputes Act. The decision, or

failure to decide, by a contracting officer is an absolute jurisdictional prerequisite to filing a suit under the Contract Disputes Act. *See Thoen v. United States*, 765 F.2d 1110, 1116 (Fed.Cir.1985); *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971, 227 Ct.Cl. 176 (1981). The district court was therefore without jurisdiction to decide General Dynamics's cross-claim against the United States for indemnification.[15]

The judgment for plaintiffs against General Dynamics is AFFIRMED; the judgment on the cross-claim by General Dynamics, seeking contractual indemnity from the United States, is VACATED.

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[15] The government alleges that General Dynamic's claim failed to comply with the requirements of § 605 in some other important respects. Although these arguments may have merit, General Dynamics never presented that claim to a contracting officer, and we need not reach any of its other deficiencies.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2965

GLORIA TREVINO, *et al.*,
Plaintiffs-Appellees,

versus

GENERAL DYNAMICS CORPORATION,
Defendant-Appellant.

No. 87-2175

GLORIA TREVINO, *et al.*,
Plaintiffs,

versus

GENERAL DYNAMICS CORPORATION,
Defendant-Cross Claim
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Cross Claim
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2-23-89, 5th Cir., 1989, 865 F.2d 1474)

[Filed June 26, 1989]

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

E. GRADY JOLLY, Circuit Judge, with whom GEE, GARWOOD and JONES, Circuit Judges, join dissenting from denial of petition for rehearing en banc:

> . . . Words strain,
> Crack and sometimes break, under the burden,
> Under the tension, slip, slide, perish,
> Decay with imprecision, will not stay in place,
> Will not stay still . . .
>
> T.S. Eliot, *Burnt Norton*, Part V.

Because I believe that *Trevino* has effectively rewritten the Supreme Court's test for government contractor immunity given in *Boyle*, I respectfully dissent from the denial of en banc review. Further, I believe that en banc review is necessary because *Trevino* is at odds with, if not in conflict with, this circuit's almost contemporaneous opinion in *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989), and that we have a responsibility to clarify ourselves. Instead, we leave the bench and bar to divide and argue over whether they can be reconciled, and if not, which will be followed as the law of the circuit.

I

The United States Supreme Court, only less than a year ago specifically chose to use the word "approve" when it held that "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications." *Boyle v. United Technologies*, 108 S. Ct. 2510, 2518 (1980). In doing so, the Court selected a less demanding word than any of the synonyms it might have chosen:

> *Approve* the most widely applicable, may indicate varying degrees of admiration. *Endorse* (or *indorse*), stronger than *approve*, implies expression of support, often by public statement. *Sanction* adds authorization, usually official, to approval. *Certify*

> and *accredit* imply official endorsement gained upon conforming to set standards. *Ratify* refers to making legal by formal official approval. . . .

The American Heritage Dictionary (Second College Edition 1982). Yet the panel in *Trevino* finds that the term "approve" as used in *Boyle* actually means to *establish* reasonably precise specifications, *id.* at 1479; it actually means to "choose" a design feature, *id.* at 1480; it actually means to exercise judgment or policy choice, *id.* at 1484; it actually means to substantively review and evaluate, *id.* at 1487 n.12; in short, it actually means to exercise a discretionary function within the strict meaning of the FTCA. We learn further in *Trevino* that one cannot "approve" a design by full awareness and acceptance of that design, defect and all, for thirteen years, *id.*; and finally, we learn that "approve" is a term that cannot be applied to work done by someone else, *id.* at 1486 ("If the government delegates its design discretion to the contractor and allows the contractor to develop the design, the government contractor defense does not apply . . . .").

Indeed, the panel, in departing from any plain meaning of the word, dolorously observes that "the Supreme Court's use of the terms 'approve' and 'considered' is unfortunate," *id.* at 2066, n.7. I would doubt, however, that the author of *Boyle* thinks it quite such a mishap. Mr. Justice Scalia was plainly aware of the precise requirements of exercising a discretionary function. He was aware that the "selection" of the appropriate design for military equipment is a discretionary function, 108 S.Ct. at 2517; and he was aware, as Justice Brennan reminded him, that the use of the word "approval" might be construed so broadly as to include rubberstamping, *id.* at 2519. Yet, when he concluded the analysis for the majority, and defined the specific test to be applied, he chose the word "approve." He did not hold that the government must "select" the design, or "choose" the design,

or "review and evaluate" the design, or "exercise its discretion," or any of the other words the panel seeks to substitute for "approve." All of the words that the panel would force on Mr. Justice Scalia, it should be added, were immediately before him as he defined the test, and he chose none of them.

Mr. Justice Scalia specifically explained that government "approval" assures that the design is *within the area* where the discretionary function policy would not be frustrated, because it assures that the design feature in question was *considered* by a government officer and not "*merely* by the contractor itself." *Boyle*, 108 S. Ct. at 2518. This explanation appears immediately after the use of the word "approved" and gives it its meaning. That government involvement be "within the area" does not mean that strict compliance with all of the elements of the discretionary function exception is required. Indeed, the Court indicated that the discretionary function exception only "*suggests* the *outlines* of 'significant conflict' between federal interests and state law in the context of government procurement." 108 S.Ct. at 2517.

I agree with the panel that "approve" is not synonymous with "rubber stamp." It does seem to me, however, that when the government furnishes 339 pages of specifications and involves a review team with the plans, "rubber stamp" is not an apt description of the government's involvement. Generally speaking, I would think that in this case if the government *considered* the plans and affirmatively assented to them, it has "approved"; or if the government, in the panel's words, was "charged with the knowledge of the defect" and accepted the design, especially for a period of years with no complaint, it has "approved" contract specifications within the meaning of *Boyle*. More specifically, I would suggest that an appropriate inquiry under the first *Boyle* prong is to ask: was the challenged feature disclosed with reasonable precision in the accepted design documents, and was the

design accepted on behalf of the government by an officer who had, and knew he or she had, the duty and authority to decline to accept the challenged design feature on safety grounds if he or she deemed it appropriate to do so? I believe this test would be truer to the spirit and deliberately chosen language of *Boyle*.

II

I also dissent from the denial of rehearing en banc in this case because the panel opinion cannot comfortably coexist with our circuit's holding in *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989). Both cases were decided on the same day.

Both *Smith* and *Trevino* construe *Boyle*'s first prong of the government contractor defense: that the government have "approved reasonably precise specifications." The cases have different focuses, however. At issue in *Smith* was whether Xerox, the government contractor, was improperly granted summary judgment on its government contractor defense because it had not been able to produce its original specifications. In *Smith*, we looked at the language "reasonably precise," catalogued the information Xerox had produced, and found that from the evidence, the specifications that had been produced satisfied the "reasonably precise" requirements of *Boyle*. Because those specifications had been *approved* by the government, we found that Xerox had satisfied the first prong of the *Boyle* test.

It is true that superficially the holdings of *Smith* and *Trevino* do not appear to be inconsistent. In applying the first prong of the *Boyle* test and asking whether the government "approved reasonably precise specifications," we focused in *Smith* upon the requirement that the specifications be "reasonably precise," not that they be "approved," which is the focus of the *Trevino* opinion. If, however, *Trevino* had been applicable law, our analysis

and holding in *Smith* would surely have been different, since the appeal was from the grant of summary judgment and there was little or no evidence in the record on how extensive the government's "substantive review and evaluation," i.e., approval, had been. Thus, although the opinions may be able to coexist, they can do so *only* because they were simultaneous.

Second, to the limited extent that *Smith* referred to "approval," we quoted the Ninth Circuit in *McKay* to the effect that approval meant "examining and agreeing" to a detailed description of the workings of the system. *Id.* at 138. Further, we referred to the Fourth Circuit's opinion in *Boyle*, and found that the Navy had "approved" reasonably precise specifications, where the contractor and Navy worked together to prepare detailed specifications, engaging in back and forth discussions, and where the Navy reviewed the mock-up and approved the design (all present in *Trevino* to some extent). *Id.* at 138.

Further, we held in *Smith* that the government had satisfied its burden on the first prong of the *Boyle* test, when the government "reviewed and approved Xerox final drawings and specifications." *Id.* at 138.

It is thus suggested in *Smith* that government *review* of the contractor's final precise specifications, followed by assent, is all that is required for contractor immunity, which is a considerably less stringent requirement than imposed by the *Trevino* panel. Thus, I would suggest that there is significant potential for conflict between *Smith* and *Trevino*. In any event, conflict or not, analytical comparison yields confusion. The bench and bar have a right to a clearer statement from us as to what *Boyle* means and how it should be applied.

Finally, I would observe that the *Trevino* panel's microscopic focus on the word "approval," unwarranted by *Boyle*, allows that term to eclipse the significant re-

mainder of the phrase—"of reasonably precise specifications." The phrase "approved reasonably precise specifications" must be interpreted as a whole. It is the approval "of *reasonably precise* specifications" that assures that the government retains veto power over all design details and assures that "the suit is within the area where the policy of 'discretionary function' would not be frustrated." *Boyle*, 108 S.Ct. at 2518. If *Trevino* is sincere when it states that "[t]he requirement that specifications be precise means that the discretion over significant details and all critical design choices will be exercised by the government; if the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor," *Trevino*, at 1418, then it is not clear why the submission and simple approval of reasonably precise specifications cannot serve as a proxy for government involvement in the design decisions.

III

In sum, I do not think that it is necessary to overdefine the word "approved" in order to make certain in these cases that the government has sufficiently exercised its discretion and judgment over the design at issue. With great respect for those whose views seem to differ, because I think that this case is enbancworthy, I respectfully dissent from the failure of the court to grant en banc review.

UNITED STATES DISTRICT COURT
E.D. TEXAS
BEAUMONT DIVISION

Civ. A. No. B-83-573-CA

GLORIA TREVINO, *et al.*

v.

GENERAL DYNAMICS CORPORATION

Feb. 3, 1986

Wayne Fisher, Charles M. Price and Michael J. Maloney, Fisher, Gallagher, Perrin & Lewis, Houston, Tex., for plaintiffs.

Herbert L. Fenster, Lawrence M. Farrell and Raymond B. Biagini, McKenna, Conner & Cuneo, Washington, D.C., for defendant.

MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROBERT M. PARKER, District Judge.

This case was tried to the Court. It is a case arising under the Death On The High Seas Act, 46 U.S.C. Sec. 761 et seq. and Federal Admiralty Law, 28 U.S.C. Sec. 1333. The Court now enters the following findings of fact and conclusions of law based upon the evidence presented.

A. THE FACTS

On the night of January 16, 1982, five Navy divers lost their lives in an accident aboard a Navy submarine, the USS GRAYBACK. The cause of death was vacuum induced bends. The accident occurred in the starboard hangar diving chamber of the GRAYBACK as the divers were preparing to exit the flooded chamber into the dry side of the hangar. To exit the chamber, it was necessary to drain the water from the wet side. This was to be accomplished by Plaintiff, Petty Officer Bloomer, who was stationed in the "control bubble," a plexiglass enclosure from which he was to open the hangar and valve to allow air into the chamber as the water drained out. After reporting the valve open, Bloomer opened the drain valve to drain the water from the hangar.

The five Navy divers died when a vacuum condition occurred as the chamber was draining. The families of four of the five deceased Navy divers brought this lawsuit against General Dynamics Corporation and the United States alleging strict liability, negligence, and breach of warranty claims.

General Dynamics also filed suit against the United States claiming that, in the event it was found liable to the Plaintiffs, the United States would be liable to General Dynamics under a contractual indemnification clause. This Court, in its September 25, 1985 order, ruled that the indemnity clause of the contracts here involved are valid and enforceable and that, therefore, the United States must as a matter of contract law indemnify General Dynamics for any adjudged liability it may have to the Plaintiffs. Such liability, however, is contingent upon whether or not this Court finds General Dynamics has met the contractual prerequisites for the claimed indemnity.

On the eve of trial, the Court, upon the government's motion, dismissed the Plaintiff's direct complaint against

the United States ruling that the United States was immune from such a suit under the *Feres/Stencel* doctrine. *See Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), *Stencel Aero Engineering Corporation v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977).

The government, nonetheless, still contends that it cannot be liable to the Plaintiffs under any legal theory. However, although it may be true that the government is immune from liability in a direct suit by the Plaintiffs, the same cannot be said where the United States has knowingly and contractually waived its *Feres/Stencel* immunity with respect to the third party suit by the government contractor. *See Order and Memorandum Opinion* of May 29, 1985, discussing and disposing of this issue.

As will be discussed in more detail later, the deaths of these divers was caused chiefly by the negligence of General Dynamics in the work that it performed with respect to the design of the starboard hangar diving system aboard the GRAYBACK during the conversion of the GRAYBACK from a missile-carrying submarine to a personnel-carrying submarine during the 1960's.

The United States Navy contracted with General Dynamics for performance of the design work with respect to the conversion of the diving system because of General Dynamics' experience and expertise in the design of submarine systems. *See* Plaintiff's Ex. 152, p. 43, l. 3-17; p. 44, l. 10-17; *See also* Plaintiff's Ex. 156 p. 63, l. 7-27.

To accomplish the conversion of the GRAYBACK, the United States entered into a series of contracts with General Dynamics. *See* Plaintiff's Ex. 1 and 2. In Plaintiff's exhibit 1, the scope of the work required of General Dynamics is set forth in section 2.7.2, as follows:

> The scope of work required of the contractor for USS GRAYBACK is the furnishing of the engineering effort needed for the preparation of working

drawings, including rip-out plans, planning department instruction sheets, test specifications and other documents necessary to effect conversion to APSS and SUBSAVE. The specific areas in which the contractors shall render assistance are: (after which are listed 24 specific areas of the GRAYBACK conversion including numerous piping, trim and drain, flood vent, ventilation, and air systems).

The responsibilities of General Dynamics with respect to the work that General Dynamics was performing under the contracts is set forth in Section 2.1.4 of the contracts which state:

(1) The contractor shall assume full responsibility for all technical research necessary to accomplish the work specified herein.

(2) All work produced is to be reviewed by the contractor to assure that the conditions set forth in this circular are complied with.

(3) The contractor is responsible for all quality assurance actions pertaining to the design product, plans, etc., including inspection of the end product item before issue.

B. NEGLIGENCE

Following the accident, the United States Navy conducted an investigation, the report and attachments of which have been introduced into evidence as Plaintiffs' Exhibits 27, 40, 41A, 41B, 41C, 42 and 43. The United States Navy found that there were four specific design deficiencies with respect to the starboard hangar diving system in the hangar diving system aboard the GRAYBACK which contributed to the accident. These four design deficiencies are stated as follows:

1. There is no safety interlock mechanism to prevent the opening of the hangar drain valve when the main vent valve is not fully opened.

2. The only valve position indicator on the main vent valve consists of a metal tab which is under water and cannot be seen when draining the hangar.

3. There was no remote position indicator which can be seen from the dry side of the hangar.

4. The general design of the hangar made proper maintenance of the main vent valve extremely difficult, if not impossible.

The Court has no quarrel with the findings of the Navy report, and for the reasons outlined below, concludes that the effort put forth by the Navy and General Dynamics in converting the GRAYBACK constituted negligence which proximately caused the deaths of the divers.

Specifically, General Dynamics was negligent in failing to:

1. provide for a safety interlock device to prevent the opening of the hangar drain valve when the main vent valve is not fully opened;

2. provide for a valve position indicator that is visible when draining the hangar;

3. provide for a remote position indicator which can be seen from the dry side of the hangar;

4. design the hangar so that the main hangar valve could be properly maintained;

5. adhere to the Navy's circular of requirements (COR) calling for the vent valve to be placed inside the control bubble rather than outside as was actually done;

6. warn the Navy about the dangers associated with the design's potential to create a partial vacuum; and

7. warn or instruct the Navy concerning its failure to provide for basic safety features such as safety

interlocks, vacuum gauges, and vent valve open/close indicator lights in the Navy's COR.

Specifically, the Navy was negligent in failing to:

1. provide for basic safety features in its COR which would prevent a partial vacuum from occurring;
2. perform sufficient operational testing;
3. conduct a formal design review of the system; and
4. properly lubricate and maintain the shaft to the main hangar vent valve.

The Court apportions the negligence as follows: 80 percent of the fault is attributable to General Dynamics, 20 percent of the fault is attributable to the Navy. Such a finding as to the Navy, however, is merely superfluous as the Court has already ruled that the United States is immune from the Plaintiff's direct suit under the *Feres/Stencel* doctrine. The Court finds no contributory negligence on the part of the Navy divers.

Before the question of damages can be reached, this Court must address General Dynamics' three contentions which, if accepted, would entitle General Dynamics to the same immunity that the Navy now possesses. The public policy question, the government contractor's defense, and the borrowed contractor's defense, and the borrowed servant doctrine are discussed in turn below.

C. THE PUBLIC POLICY CONSIDERATIONS

General Dynamics argues that as a matter of policy, the Court should exercise judicial restraint and defer to the Navy's conclusions that the design of the hangar vent system was not defective but was adequate and safe for its intended purpose and that the direct, proximate cause of the accident was Plaintiff Bloomer's failure to open the hangar vent valve. This Court does not agree.

In *Bynum v. FMC Corporation*, 770 F.2d 556 (5th Circuit 1985), the Fifth Circuit endorsed, in its entirety, the Supreme Court's admonition of judicial restraint in reviewing military decisions relating to the armed forces. Tracing the historical underpinnings of the government contract defense, the Fifth Circuit noted that the Supreme Court's emphasis "on judicial restraint in military matters is, of course, not surprising." *Id.* at 562. The Court stated that:

> It has long been recognized that interference by civilian courts with military authority inevitably raises both questions about judicial competency in this area and separation of powers concerns.

The Fifth Circuit found that the same policy considerations underlying the *Feres/Stencel* doctrine also are at issue "whether the named defendant happens to be the government or the military contractor." *Id.* at 565. The most important policy consideration in either case is that "civilian courts would be compelled to second guess professional military judgment concerning, at least, the proper equipping of the armed services." *Id.*

Public policy, however, does not require any judicial restraint in this case simply because this Court is not reviewing military decisions relating to the armed forces. The Plaintiffs are not challenging a military decision concerning military operations. The issue is a design decision concerning design defects in the diving hangar aboard the GRAYBACK made by General Dynamics designers. This was purely a non-military decision requiring no military expertise. Nor was there a conscious decision on the part of the military to accept a known hazard because of military considerations.

By example, if the Army had contracted for the design of a tank desiring speed and mobility in combat it might conclude that the tank must be designed with less armor to reduce weight so as to maximize speed and mobility.

Less armor, of course, would offer more risk and less protection to the servicemen inside the tank, but this is clearly a conscious military decision on the part of the Army to accept a known hazard because of the Army's desire for speed and mobility of its tank in combat. Such a decision would not be reviewable in this Court's opinion. That is not the case here. No evidence has been presented to show that the Navy consciously decided on this specific diving system design for military reasons, e.g., to reduce noise under water so as to avoid detection by the enemy.

Furthermore, the Court has found no authority to the effect that the accident reports by the military are conclusive on liability. There are very few cases which even discuss whether military accident reports should be given conclusive weight. The general rule that reports by the military are *not* binding on the courts is stated by the Fifth Circuit in *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir.1982).

Finally, General Dynamics and the Navy contend that even if the Court does not defer to the Navy's conclusions, considerations of public policy demand that mere approval by the government of a contractor's design be sufficient to preclude recovery by the plaintiffs. As is discussed more fully later, this Court is not persuaded that mere approval from a public policy standpoint is sufficient to preclude recovery.

D. THE GOVERNMENT CONTRACTOR'S DEFENSE

General Dynamics contends that the government contractor's defense shields General Dynamics from any liability to the Plaintiffs in negligence. This Court disagrees.

The Law

The burden of proof regarding the availability of the government contractor's defense rests with General Dy-

namics. *McKay v. Rockwell International Corp.*, 704 F.2d 444, 451 (9th Cir.1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). General Dynamics must prove each element of the defense by preponderance of the evidence. *Id.* at 453.

In *Bynum*, the Fifth Circuit recognized the government contractor's defense as a matter of federal common law. To establish the government contractor's defense, a military contractor must:

1. First, demonstrate that the government is immune from liability under the *Feres/Stencel* Doctrine . . .
2. Second, the military contractor must prove that the government established reasonably precise specifications for the allegedly defective military equipment
3. and that the equipment conformed to those specifications . . .
4. Finally, it must be shown that the military contractor warned the government about errors in the government specifications or in dangers involved in the case of the equipment that were known to the contractor but not known to the government.

Id. at 574.

The Fifth Circuit's four-prong test conforms to the trend in the law on the government contractor's defense as represented by the Third Circuit's decisions in *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3rd Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985) and *In Re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115 (3rd Cir.1985); the Seventh Circuit's holding in *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir.1985); the Ninth Circuit's decision in *McKay v. Rockwell International Corp.*, 704 F.2d 444

(9th Cir.1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984) and the Eleventh Circuit's decision in *Burgess v. Colorado Serum Co.*, 772 F.2d 844 (11th Cir.1985).

In the instant case, General Dynamics has failed to establish by a preponderance of the evidence that the government contractor's defense applies. Although General Dynamics has demonstrated that the government is immune from suit under the *Feres/Stencel* doctrine, meeting the first prong, it cannot meet the second prong because it was General Dynamics and not the Navy, who ultimately "established reasonably precise specifications" for the diving system. *Bynum*, 770 F.2d at 574. Given this finding, the third prong of *Bynum* is not even implicated. As to the final prong, General Dynamics failed not only to warn of the danger of a partial vacuum but also failed to warn of design deficiencies in the Navy's general requirements. Each prong is discussed in turn below.

The Law Applied

1. The first requirement of the government contractor's defense is the presence of *Feres/Stencel* immunity on the part of the government. *Feres/Stencel* immunity requires that a Plaintiff's complaint arise from an injury to a serviceman in the course of activity incident to military service. *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2058; *Feres*, 340 U.S. at 146, 71 S.Ct. at 159. In this case, Plaintiff's complaint arises from the death of servicemen caused by a partial vacuum in the submarine starboard hangar diving chamber which the servicemen were in incident to their service in the United States Navy. This case, thus, falls squarely within the protective shield created by *Feres/Stencel* doctrine. Accordingly, the government is immune from liability to the Plaintiffs.

2. The second element of the government contractor's defense, as the Ninth Circuit formulated the defense in

McKay, 704 F.2d at 451, is establishment or approval by the United States government of reasonably precise specifications for the allegedly defective product. In this case, General Dynamics contends that the Navy established the specifications for the diving chamber by either preparing them itself or by reviewing in detail and approving those prepared by General Dynamics employees. For the reasons discussed below, this Court does not agree that the Navy established these specifications or approved them.

a. The Establishment Question

Under *Bynum*, it is clear that when the product is "manufactured in accordance with precise design specifications furnished by the . . . government," the second prong of the government contractor's defense is satisfied. *Id.* at 574 n. 23. *Bynum*, however, did not address the "extent to which the government must participate in generating the design specifications of the military equipment before the government contractor's defense would be applicable," which is directly at issue in this case. *Id.*

The contracts involved here left design entirely to the discretion of General Dynamics. The Navy set only general performance standards leaving the details to General Dynamics. Specifically, the United States provided General Dynamics with mere skeletal guidelines embodied in the COR and schematic line drawings. *See* Plaintiff's Ex. 38 & 39. However, less than two pages of the COR refer to the conversion of the diving hangar while the line drawings consist of only a one page diagram of the flood and drain system. These general guidelines did not specify the precise location of the main hangar vent valve and were silent on the existence of vacuum gauges, indicator lights, or safety interlocks for the main hangar flood and drain system. The evidence shows that such determinations were left to the discre-

tion and expertise of the General Dynamics designers assigned to prepare the working drawings.

The Court credits the testimony of Mr. Bill Milwee, the Plaintiff's expert, and is persuaded that General Dynamics' designers had to use a great deal of expertise and discretion in converting the information provided by the Navy into working drawings. *See* Plaintiff's Ex. 5-10. The Court is also persuaded by the testimony of Mr. Urbani and Mr. Reall, both General Dynamics employees, and finds that because the system diagrams were not very detailed, General Dynamics had to use their own specialized knowledge in converting the diagrams into working drawings. *See* Urbani depo. p. 18; *Reall* depo. p. 31, l. 6-10.

With this sparse information, General Dynamics produced 71 pages of highly detailed working drawings for the starboard hangar diving system. Under such circumstances, where "only minimal or very general requirements are set for the contractor by the United States" it cannot be seriously maintained by General Dynamics that it was the government and not General Dynamics who "established reasonably precise specifications." *McKay*, 704 F.2d at 450; *cf. Price v. Tempo, Inc.*, 603 F. Supp. 1359, 1363 (E.D.Pa. 1985). Simply concluding, however, that these plans were reasonably detailed specifications of General Dynamics does not dispose of the second prong of the government contractor's defense since the trend in the law is to interpret the phrase "established by the government" as including the situation where the government, after having conducted a detailed review, approves drawings and specifications on which the contractor assisted.

b. The Approval Question

From a factual standpoint, the level of review here was not sufficient to constitute "approval". *Koutsoubous* and *Mannheim* definitively analyzed this standard of

proof. In *Koutsoubous*, a helicopter manufactured by Boeing Vertol crashed causing the deaths of several Navy pilots. In granting Boeing's motion for summary judgment on the government contractor's defense, the District Court concluded that the Navy had established the specifications by approving them after a substantial review and that Boeing had complied with the specifications. *See Koutsoubous*, Memorandum Decision p. 7A, note 4, Dec. 22, 1982.

In affirming the District Court, the Third Circuit concluded that "government approval of the specifications" means the process by which the government "examines and agrees to a detailed description of the workings of the system." *Koutsoubous* 755 F.2d at 355. In *Koutsoubous*, the Third Circuit noted that the District Court found a "continuous back and forth relationship between Boeing and the Navy with the Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to the specifications." *Id.*

Five months later, the Third Circuit in *Mannheim* reaffirmed *Koutsoubous* on the "approval" standard. In *Mannheim*, forty-six persons were killed when a helicopter manufactured by Boeing crashed. The Third Circuit, stated:

> The government contractor defense is available to a contractor that participates in the design of the product, so long as the government's approval consists of more than a mere rubber stamp. The defense is available so long as there is *true government participation* in the design.

769 F.2d at 122 (emphasis added). The Third Circuit then ordered the District Court to enter judgment for Boeing on the basis of the government contractor's defense.

If approval of the design of military hardware by examining agreeing to a detailed description of the work-

ing drawings of the system is sufficient to satisfy the requirements of the government contractor's defense, then there was no such "approval" under the facts of the case. Although the government's review did involve some subjective evaluation of the contents of the plans, the level of examination did not equate to the amount of engineering expertise required by General Dynamics to prepare the plans. Therefore, this Court concludes that "true government participation in the design" necessary to constitute approval was lacking. *Mannhein*, 769 F.2d at 122.

Under *Bynum's* balancing test, General Dynamics' level of participation in the design so outweighed the government's level of participation that it was General Dynamics, who was ultimately responsible for the "reasonably precise specifications" involved here. *Id.* at 574. In the real world, although the government and the contractor may jointly work together in producing specifications, the level of participation always varies. Sometimes the government's participation is minimal at best. That is the very case here.

Given the disparity in the level of expertise between the Navy and General Dynamics and the "imbalance of knowledge" about the safety deficiencies in the design at the time General Dynamics' specifications were approved, it cannot be seriously argued that the Navy engaged in any "substantial review of the specifications." *Mannheim*, 769 F.2d at 123; *See Also Shaw v. Grumman Aerospace Corp.*, 593 F.Supp. 1066, 1074 (S.D.Fla. 1984).

The most telling evidence of the limited review which the work of General Dynamics' designers and engineers received is Plaintiff's Exhibit 28. This exhibit is a memo prepared by Paul Lawrence to his superiors at Mare Island Naval Shipyard which discusses the history of the GRAYBACK design. Mr. Lawrence was the section leader of the group which prepared the hangar flood and

drain system drawings. On page 4, paragraph (e), Mr. Lawrence stated, "Most of the GRAYBACK design work was accomplished by farmed-in contractor personnel and not checked by Mare Island experienced technical people."

General Dynamics was hired for the expertise and the experience it possessed. The government neither possessed the qualifications nor the ability to engage in any substantial review of General Dynamics' specification. Moreover, the design decisions, material to the defects alleged, required no military expertise, therefore, there is no justification for insulating General Dynamics from liability where the government merely approves of the decision. "In any case, mere Navy approval of the detailed design specifications and drawings developed by General Dynamics does not make the government contractor's defense available to it." *Shaw*, 593 F.Supp. at 1074. If it did then under *Koutsoubous* and *Mannheim*, the government contractor's defense would seem always to apply and contractors would never be liable for a defective product because the government would always be in the position to approve a contractor design. The government's approval in this case is no different from the approval of any product or design prepared for the government. If that type of approval is sufficient to satisfy the second prong, then there would never be a recovery under any circumstances against defense contractors. Where the government has only given mere approval, *Bynum* does not contemplate no recovery under any circumstances against defense contractors. *Id.* at 574 n.23.

3. The third element of the defense is compliance with the government's specifications. This prong is not implicated in this case because it was General Dynamics and not the government who established "reasonably precise specifications" for the defective design. This Court notes, however, that the system is designed by General Dynamics *did not even* conform to the general requirements provided by the government. Specifically,

the COR required that the main hangar vent valve be "controllable from the air bubble and the berthing space." *See* Plaintiff's Ex. 28, p. 223, l. 95. The design of the system by General Dynamics did not conform to this requirement. The working drawings of the system prepared by General Dynamics shows the main hangar vent valve located on the vent pipe at a 45 degree angle. *See* Plaintiff's Ex. 6. The testimony of the witnesses in this case forces the conclusion that the General Dynamics designer intended that the valve control handle be located outside the control bubble and berthing space, despite the government's instructions to the contrary. This is where, in fact, the valve was located at the time of the accident.

4. Finally, to satisfy the fourth and final prong of the government contractor's defense, General Dynamics has the burden to prove that it "warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the contractor but not to the United States." *Bynum*, 770 at 574. The fact that there was no warning is undisputed.

The Navy hired General Dynamics specifically because it had specialized knowledge of submarine design. General Dynamics assumed the responsibility of advising and warning the Navy on the safety aspects of the systems that General Dynamics was designing. *See* Plaintiff's Ex. 30. Both the Navy and General Dynamics knew or should have known of the dangers associated with the system's potential to create a partial vacuum absent basic safety features. The creation of a vacuum and its effect on humans is a fundamental engineering principle deserving no further comment. If either General Dynamics or the Navy had paid sufficient attention to the COR or the working drawings or had engaged in any quality assurance or operational testing procedures, the problem of a partial vacuum would have been obvious. General Dy-

namics, howecer, failed to warn the Navy about patent errors in the government's general requirements or their own working drawings.

Specifically, General Dynamics did not warn the Navy of its failure in the general requirements to provide for basic safety features such as: 1) safety interlocks, 2) vacuum gauges, or 3) vent valve open/close indicator lights. In the final analysis, although the Navy's failure to perform sufficient operational testing or to conduct a formal design review before putting the system into operation constitutes negligence as it would have discovered the system's potential to create a partial vacuum, it does not dismiss the fact that the obligation to perform the technical research necessary for the design conversion of the GRAYBACK and to identify any hazards fell fully on the shoulders of General Dynamics. *See* Plaintiff's Ex. 1-3. Thus, General Dynamics has failed to satisfy the fourth prong of the defense.

In summary, General Dynamics has only established the first prong of the four-part test. Thus, the government contractor's defense does not apply. "Federal law provides no defense to the military contractor that mismanufactures military equipment or that it is itself ultimately reasonably for the design defect." *Bynum*, 770 F.2d at 574. In this case, General Dynamics, rather than the government, was ultimately responsible for the design defects in the driving hangar aboard the GRAYBACK which were the proximate cause of the accident in question. Thus, General Dynamics is not entitled to stand under the umbrella of sovereign immunity with the government and must be held accountable for its negligent acts and omissions.

E. THE BORROWED SERVANT DOCTRINE

General Dynamics next argues that even if the Court concludes that the government contractor's defense does not apply, General Dynamics cannot be found liable to the Plaintiffs for the injuries they sustained as a matter

of law because the employees involved in the GRAYBACK conversion were not acting as General Dynamics employees, but instead were borrowed servants of the government. This Court disagrees.

The Law

In the Fifth Circuit, the test of whether or not a person is a borrowed servant is factual. *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 376 (5th Cir. 1985); *Ruiz v. Shell Oil Company*, 413 F.2d 310, 312-13 (5th Cir. 1969). "The central question involving servant cases is whether someone has the power and control to direct another person in the performance of his work". *Hebron v. Union Oil Company of California*, 634 F.2d, 245, 247 (5th Cir. 1981). The test to determine whether a borrowed servant relationship exists requires consideration of a variety of factors, none of which is conclusive or decisive. *See Ruiz v. Shell Oil Company*, 413 F.2d, 310 (5th Cir. 1969).

The Law Applied

1. It is legally impermissible for the government to contract non-governmental employees who are merely to receive their assignments from government personnel because this is a violation of the Civil Service laws. *See* 5 U.S.C. § 3109. However, even though the master/servant relationship was proscribed, the Court may still find that such a relationship did, in fact, exist between Mare Island Naval shipyards and the General Dynamics employees. Under the facts of this case, however, the Court cannot do so.

2. The United States Navy hired General Dynamics specifically because its employees were experienced and would not need supervision. Although there was cooperation between the Navy personnel and General Dynamics personnel, the Navy did not intend to control or supervise the particulars or actual details of General Dynamics employees' work. General Dynamics was hired without any competitive bidding specifically because Gen-

eral Dynamics had specialized knowledge in submarine piping design and would, therefore, not need close supervision in performing the discretionary design work. In determining whether an employee is a borrowed servant, cooperation between the employee and the alleged borrowing employer, as distinguished from subordination, is not enough to create an employment relationship. *See Standard Oil Company v. Anderson*, 212 U.S. 215, 226, 29 S.Ct. 252, 256, 53 L.Ed. 480 (1909).

3. The contracts themselves evidence the intention not to create a borrowed servant relationship. If the parties to the contracts had intended the General Dynamics designers and engineers to be borrowed servants of the Navy, and to work under government scrutiny with their tasks chosen at the whim of the Navy depending upon day-to-day needs, there would have been no need to define what work needed to be performed or to describe the scope of the work. However, in all three contracts the responsibilities of General Dynamics is set out with great specificity. *See* Plaintiff's Ex. 1, Sec. 2.1.4 of Contract No. 0221, Plaintiff's Ex. 2 of Contract No. 1212, and Plaintiff's Ex. 3, Sec. 1.4 of Contract No. 1832; *See Also* Plaintiffs' Ex. 1, Sec. 2.7.2. If the parties to these contracts had intended that General Dynamics' designers would receive their instructions on a day-to-day basis from Mare Island supervisors, there would have been no need to describe General Dynamics' specific areas of responisibility in the agreement.

4. General Dynamics maintained its employer/employer relationship and retained the obligation to pay General Dynamics employees. The General Dynamics employees assigned to the GRAYBACK conversion at Mere Island did not acquiesce to becoming government employees. The Court is persuaded by Mr. Reall's testimony and concludes that he considered himself a General Dynamics' employee at all times. *See* Reall depo. at p. 261, l. 16-18. Nor did General Dynamics terminate its rela-

tionship with its employees. General Dynamics maintained an administrative structure which was headed by Mr. Conway Davis, the General Dynamics supervisor at Mare Island, whose second in command was Mr. Robert Urbani. The travel arrangements, housing, personnel problems and pay all were the concern of General Dynamics, not that of the Navy. Also, while at Mare Island, both Mr. Conway Davis and Mr. Robert Reall received their pay, from General Dynamics, not from the Navy.

Given these facts, the Court concludes that General Dynamics was an independent contractor given discretionary, independent decision-making authority and, therefore, its employees were not borrowed servants of the government.

F. THE PRECONDITION TO THE GOVERNMENT'S LIABILITY

The contracts between General Dynamics and the United States contain preconditions for indemnity set forth in Standard Clause 21, entitled Insurance Liability to Third Persons. This clause provides at (c) that the contractor shall be reimbursed "for liability to third persons . . . for death or bodily injury," which are "not compensated by insurance or otherwise . . . *provided* such liability is represented by final judgments." (Emphasis in original). Absent stipulation of the parties, this Court will conduct an evidentiary hearing in order to make findings as to whether or not General Dynamics has met the contractual prerequisite for the claimed indemnity.

G. DAMAGES

The Court is persuaded that each party's evaluation of damages incurred in this case is not significantly different. Therefore, the Court extends a period of 30 days to the parties to confer in order to reach a stipulation or to make a joint recommendation as to what the award

of damages should be. The Court, of course, expects none of the parties to waive any of their possible defenses or rights by engaging in this process of negotiation.

H. A RECENT DECISION

One of the primary issues in this case is the application of the government contractor's defense. Subsequent to the time this order was prepared but prior to filing, the Eleventh Circuit handed down it's decision in *Shaw v. Grumman*, 778 F.2d 736 (11th Cir.1985) addressing this very issue. The threshold question before the Court, according to Judge Johnson, was whether the United States had actually made an informed decision to use a particular military product despite knowledge of the inherent risks. In affirming the District Court's judgment for the Plaintiff, Judge Johnson concluded that "although the Navy did formally approve Grumman . . . [Aerospace Corporation's] specifications and design changes, that approval did not constitute the sort of informed military decision to accept the risk of dangerous product to which this Court must defer under separation of powers doctrine." *Id.* at 747.

Although the Eleventh Circuit test is different from the test set forth in the *Bynum* decision, it is reasonably calculated to produce the same result: to place liability upon the party ultimately responsible for the defect. Nothing in the Judge Johnson decision is inconsistent with what has been done in this case. Here, no such informed decision was made by the United States Navy when it employed the General Dynamics' design of the hangar, flood, and drain system on board the USS GRAYBACK. Liability has been fairly placed upon the party "ultimately responsible for the design defect." *Bynum*, 770 F.2d at 574.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 86-2965 and
87-2175

D. C. Docket No. CA-B-83-573

GLORIA TREVINO, *et al.*,
Plaintiffs-Appellees,
v.

GENERAL DYNAMICS CORP.,
Defendant-Appellant.

GLORIA TREVINO, *et al.*,
Plaintiffs,
v.

GENERAL DYNAMICS CORP.,
Defendant-Cross Claim
Plaintiff-Appellant,
v.

UNITED STATES OF AMERICA,
Defendant-Cross Claim
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court for plaintiffs against General Dynamics in this cause is affirmed; and the judgment on the cross-claim by General Dynamics, seeking contractual indemnity from the United States, is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that General Dynamics Corporation pay to plaintiffs-appellees and defendant cross claim defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

February 23, 1989

Issued as Mandate: July 6, 1989 OP-JDT-11

A true copy

Test:

Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Karen L. Comeaux

KAREN L. COMEAUX
Deputy
New Orleans, Louisiana
July 6, 1989